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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 841.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED APRIL 9, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a *Transcript on Appeal.*

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Smith, Brown & Hutton and S. M. White, attorneys for respondent.
Glassell, Smith & Patton, attorneys for appellant.

Complaint.

1 In the Superior Court of the County of Los Angeles, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant.

Plaintiff avers that the defendant is indebted to plaintiff in the sum of $31,470.58, State and county taxes for the fiscal year 1880–'81, with five per cent. added for the non-payment of such taxes, and $\frac{50}{100}$ dollars, costs of collection to date.

Plaintiff demands judgment for said several sums, and prays that an attachment may issue in form, as prescribed in section five hundred and forty of the Code of Civil Procedure.

W. B. CULLEN,
Tax Collector of Los Angeles County.
SMITH, BROWN & HUTTON,
His Attorneys.

Filed March 10, 1882.

2 *Answer.*

Title of court and cause.

Now comes the defendant, and answering the complaint of plaintiff herein:

I.

Denies each and every allegation in said complaint had, made, or contained. Denies that the defendant is indebted to plaintiff in any sum whatever for State or county taxes, percentage, costs, or otherwise; and

Denies that any assessment was made against defendant for the fical year 1880–'81.

Defendant refers to and makes part of this subdivision the matters and things stated in subdivisions 2 to 37, inclusive of this answer.

And for further and separate answer defendant avers:

II.

Defendant a Corporation. Its Place of Business. Line of Road. Stockholders.

That it is a corporation existing under the laws of the United States and the State of California (as will hereafter more fully appear). That the principal place of business of defendant now
3 is, and for many years last past has been, in the city of San Francisco, State of California. That a great number of its stockholders now are, and ever have been, citizens of the United States and residents of said State of California, while other of its stockholders now are, and ever have been, citizens of the United States and residents of States other than the State of California.

III.

S. P. R. R. The Use and Purposes Thereof.

That as such corporation it constructed a line of railroad and procured the rolling stock and all appurtenances thereunto belonging, known and designated as the Southern Pacific railroad (of California), and described as follows: Commencing on the waters of the Pacific Ocean, in the city and county of San Francisco, and extending in a southerly direction through portions of the county of San Francisco, and through the county of Santa Clara to Tres Pinos, in the county of San Benito, with a branch therefrom running from Carnadero, in the county of Santa Clara, to Soledad, in the county of Monterey; that said line of railroad also extends from Huron, in Fresno county, to Goshen, in Tulare county, and thence in a southerly direction by way of Tehachapi Pass, Mojave and Los Angeles to
4 the Colorado river at Fort Yuma, with three branches from said line at Los Angeles, extending respectively to Santa Monica, Wilmington and Santa Ana, in the county of Los Angeles. That said line of railroad is connected with the Texas and Pacific railroad at El Paso, in the State of Texas, by two railroads, to wit, The Southern Pacific railroad (of Arizona), extending from Fort Yuma to the eastern boundary line of Arizona and the Southern Pacific railroad (of New Mexico), extending from said eastern boundary line across New Mexico to El Paso. That the said several railroads are operated as one continuous line from a point near Marshall, in Texas, to the Pacific Ocean at San Francisco, for the uses and purposes and in the manner contemplated by the acts of Congress hereinafter referred to.

That from Tres Pinos to Huron the said Southern Pacific railroad has not been completed, but pending its construction, connection between said points is made over the line of the Central Pacific railroad. That defendant has not completed the construction of the road from said Southern Pacific railroad to the Colorado river to connect with the Atlantic & Pacific railroad, hereinfter referred to, but
5 has the construction thereof under contract, and will soon have completed a road from Mojave, on the line of said Southern Pacific railroad, to the Colorado River, there to connect with said

Atlantic & Pacific, and with the said Atlantic & Pacific, when completed, making a continuous line from Springfield, in the State of Missouri, to the Pacific Ocean, as contemplated by the act of Congress, hereinafter referred to, chartering the Atlantic & Pacific railroad Company.

IV.

Length of the Road in the Several Counties.

That of said Southern Pacific railroad (of California) there has been, prior to the first Monday in March, 1880, completed, and there was in operation in the several counties through which it runs, $706\frac{18}{100}$ miles to wit: In the city and county of San Francisco, $7\frac{3}{100}$ miles; in the county of San Mateo, $21\frac{10}{100}$ miles; in the county of Santa Clara, $69\frac{30}{100}$ miles; in the county of Santa Cruz, $2\frac{15}{100}$ miles. in the county of San Benito, $17\frac{65}{100}$ miles; in the county of Monterey, $49\frac{28}{100}$ miles; in the county of Fresno, $17\frac{93}{100}$ miles; in the county of Tulare, $61\frac{98}{100}$ miles; in the county of Kern, $117\frac{83}{100}$ miles; in the county of Los Angeles, $139\frac{48}{100}$ miles; in the county of San
6 Bernardino, $54\frac{60}{100}$ miles, and in the county of San Diego, $158\frac{85}{100}$ miles, and all within the State of California.

V.

Act of Congress of July 27th, 1866. Atlantic and Pacific Act.

That on the 27th day of July, 1866, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the headwaters of the Colorado Chiquita, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route, to the Colorado river, at such point as might be selected; and thence by the most practicable and eligible route to the Pacific Ocean, and to that end Congress passed an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which act was approved on said 27th day of July, 1866, and to which act defendant here refers by title and makes it part of this answer. (See United States Satautes-at-Large, vol. 14, page 292.) That by said act certain persons therein
7 named were made and erected into a corporation under the name and style of the "Atlantic & Pacific Railroad Company."

VI.

Intent of Congress in Passing Act of 1866.

That the intent and purpose of Congress in passing said act was to secure the completion of a railroad from the Missouri river to the Pacific Ocean with a branch to San Francisco, and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

VII.

Like Privileges and Immunities Granted to Defendant.

That to facilitate construction of said road the Government of the United States, by said act of Congress, adopted the defendant as instrument or agent of the United States to carry out the purposes aforesaid, and conferred upon defendant the same powers, and clothed defendant with the same privileges and immunities, which it confered upon and clothed the Atlantic & Pacific Railroad
8 Company with, except that the said defendant was to construct that portion of said railroad between the Colorado river and the city and county of San Francisco.

VIII.

Acceptance of the Conditions.

That the said Atlantic & Pacific railroad did organize under said act, and did obtain *bona fide* subscriptions to the stock of said company to the amount of one million dollars, with ten per centum paid within two years after the passage and approval of said act of Congress; and the said company and plaintiff did immediately after the passage of said act accept the terms and conditions thereof, and the said company and defendant have duly complied therewith.

IX.

Roads Constructed Under said Act.

That the said company has nearly completed, and will, within a short time, have fully completed, the whole of said road from Springfield to the Colorado river; and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out, and is prosecuting the construction thereof from said Mojave to a
9 junction with the road of the Alantic & Pacific Company at the Colorado river; and that the whole of said road will be completed and in operation within the present year.

X.

Act of Congress of March 3d, 1871. Texas Pacific Act.

That on the 3d day of March, 1871, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado river to construct, or cause to be constructed, a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the act of Congress of July 27th, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city of San Francisco, and to that end Congress passed an act entitled "An act to incorporate the Texas Pacific Railroad Company,

and to aid in the construction of its road, and for other purposes," approved March 3d, 1870, and subsequently, on the 2d day of May, 1872, passed an act entitled "An act supplementary to an act
10 entitled an act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871, to which acts defendant here refers by title, and makes them part of this answer. (See vol. 16, U. S. Statutes-at-Large, 573; vol. 17, *Id.* 59.)

XI.

Provisions of said Acts Accepted by the Texas Pacific Railroad Company and by Defendant. Their Work Thereunder.

That immediately after the passage of said act of March, 1871, the Texas Pacific railroad was organized in pursuance thereof, and it and defendant accepted all the terms and conditions of each of said acts of 1871 and 1872, and have fully and in every respect complied therewith, and under them and in compliance with the spirit and intent of said acts, have completed the roads mentioned in the third subdivision of this complaint.

XII.

Intent of Congress in Passing the Acts of 1871 *and* 1872.

That the declared purpose of Congress in passing said acts was to insure the carrying of the mails, troops, munitions of war,
11 supplies, and stores of the United States, and that Congress expressly declared in said acts that no act of the companies, or either of them, nor any law of any State or Territory should ever impede, delay, or prevent the companies mentioned from performing their obligations to the United States in that regard.

XIII.

Indebtedness of Defendant Secured by Mortgage.

That prior to the first day of January, 1881, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and residents of the State of California, in large sums for moneys advanced to construct and equip the railroad hereinbefore described; that to secure the payment of such indebtedness the said company, long prior to the first day of January, 1881, executed and delivered a mortgage upon said Southern Pacific Railroad and all rolling-stock and appurtenances; that said indebtedness exceeded and still exceeds three thousand dollars per mile of said road; that no part thereof has ever been paid, except the accruing interest, and that the whole thereof is now, and since the execution of said mortgage has been, a valid and subsist-
12 ing indebtedness against said company, and has been and still is secured by said mortgage.

XIV.

Assessment by State Board of Equalization.

That on the 2d day of May, 188–, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10, of article XIII, of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing, upon the franchise, roadway, roadbed, rails, and rolling-stock of said railroad against defendant; that said pretended assessment was made separately upon the franchise, roadway, roadbed, rails, and rolling-stock of said railway, and was then and there so entered upon the minutes of said board. And that said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based; that no other assessment than the aforesaid was ever made of said property, or any part thereof, for said fiscal year.

13

XV.

Failure of State Board to Transmit Assessment.

That the State board of equalization never did at any time transmit said pretended assessment or any assessment of said property, or any part thereof, to the assessor, or to any of the authorities of said county, and never at any time caused the same to be entered upon the assessment roll of said county for said fiscal year or for any other year, nor has said pretended assessment, or any part thereof, or any assessment against said defendant or said property, or any part thereof, ever been entered upon or made part of any assessment roll, book, or delinquent list in or for said county.

XVI.

State Board Never Apportioned Assessment.

Defendant avers, upon its information and belief, that neither said pretended assessment nor any assessment against defendant in respect to said property, or any part thereof, was ever entered upon any assessment roll or book of said county of Los Angeles, nor upon any delinquent list of said county, nor was any entry relative to the action of the said State board of equalization in respect to the

14 assessment or apportionment of said property, or any part thereof, ever entered upon said assessment roll or book, except a letter of the State board of equalization addressed to the assessor of said county, and that said letter did not contain said assessment or any part thereof, nor a copy of said assessment or any part thereof, nor did it contain any apportionment thereof, as provided for in section 10 of article XIII of the constitution of the State of California, hereinbefore referred to, or otherwise.

XVII.

No Assessment was ever Made or Entered on the Assessment-Roll.

Defendant, upon information and belief, avers that neither said pretended assessment nor any assessment against this defendant or any other person or persons, in respect to the said property, or any part thereof, was ever entered upon any assessment roll or book of said county of Los Angeles, nor upon any delinquent list of said county; nor was any entry relative to the action of the said State board of equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or book, except the said letter of the said
15 State board of equalization. That said letter was copied by the assessor of Los Angeles county, on or about the 1st day of June, 1880, upon the assessment. That upon said assessment-roll opposite said letter is entered in figures $2,054,979, and opposite said figures, under the head of taxes due, is entered in figures $30,824.68. That the same entries and no others appear upon the delinquent list of said county for said fiscal year. That as defendant is informed and believes, and upon such information and belief, charges the truth and fact to be that there are in respect to the said property, and in respect to petitioner, no other or further entries upon any assessment roll, book or delinquent list of said county.

XVIII.

State Board Pretended to Assess the Whole of said Property to Defendant.

That the State board of equalization, in making the said pretended assessment, pretended to assess to and against defendant, the whole of said railroad, roadway, roadbed, rails, rolling-stock, and franchises, and failed to deduct therefrom the value of the
16 mortgages given and existing as aforesaid thereupon to secure the indebtedness of said company to the holders of said bonds.

XIX.

State Board did not Treat said Mortgage as an Interest in the Property.

That in making said pretended assessment the State board of equalization did not deem or treat said mortgages as an interest in said property, but did assess the whole of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

XX.

Pretended Assessment and Apportionment made before any other Assessments in the State.

That the time said pretended assessment was made, and said pretended apportionment was made by the State board of equalization, no assessment book or roll for the said fiscal year had been com-

pleted or was in existence, nor had a single assessment or valuation for the purpose of taxation for said fiscal year been ascertained or fixed, as provided by law or otherwise, and that said board, in making said valuation and apportionment, neither did nor could
17 exercise any of the powers relative to the equalization of values for the purposes of taxation.

XXI.

Authority Exercised by the State Board Violates Provisions of Fourteenth Amendment.

That under the constitution of the State of California the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, roadbed, rails and rolling-stock of railroads operated in more than one county of the State, and that to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of the assessed values of such property, and have the right and privilege of a hearing before the said local boards of equalization. That by the provisions of the constitution of California, and the laws thereof, this right and privilege, or any right and privilege, to be heard in relation to the said assessment, is denied in respect to the property in question.
All of which defendant avers is contrary to the provisions of
18 the Fourteenth Amendment to the Constitution of the United States.

XXII.

Further Violation of Fourteenth Amendment.

That the said State board of eqalization never, at any time, made or had any rule or regulation relative to the assessment or valuation of railway property of any kind, nor never made or had any rule to govern or regulate its proceedings for the exercise of the powers conferred upon it by section 10 of article XIII of the constitution of California.

XXIII.

Further Discrimination.

That the power conferred upon the State board of equalization by section ten of article XIII of the constitution violates the provisions of said Fourteenth Amendment, for that said section, as to such powers, is self-executing and complete, and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such powers; and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be
19 heard in defense of their rights, and that from, under, and by said provision of the constitution of the State of California the liability of owners of such property to taxation, and the amount thereof, may be fixed without notice or an opportunity to be heard.

XXIV.

Further Discrimination.

That the provisions of the constitution of the State of California, providing for the assessment of railroad property operated in more than one county is in contravention of the provisions of said Fourteenth Amendment of the Constitution of the United States, in this, that it discriminates against the owners of railroad property operated in more than one county; in this, that whereas, under section four of said article XIII of the constitution of the State of California, if the owner of other kinds of real property have a mortgage, lien, or incumbrance thereon, he is not liable to assessment or taxation upon such property, nor for the value of his interest in such real estate over and above the value of such mortgage, lien, or incumbrance; whereas, in case of railroad property, no such allowance or deduction is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property.

XXV.

Further Discrimination.

That all owners of railroad property operated in more than one county, by virtue of the provisions of said section ten, of article XIII, which relate to the assessment by the State board of equalization of such property, are denied any protection from the laws of the State of California, which—

(*a*) Require that property shall be taxed in proportion to its value.

(*b*) Require such proportions to be ascertained by a general law.

(*c*) Require that before liability be fixed an opportunity to be heard must be given.

(*d*) Give an appeal from the assessor to boards of equalization.

(*e*) Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property.

(*f*) Which prescribe mode and manner of the assessment.

(*g*) Which allow deductions for indebtedness secured by mortgage.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds, formed for the purpose of and actually operating and doing business and holding and using and operating property in more than one county in said State, and that at all of said times there were, and there now are, divers natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State which are only operated in one county. That by the provisions of section 10 of art. XIII of said State constitution, persons operating railroads in more than one county in the State have been singled out from all

other persons operating property in more than one county, and denied the right common to all other persons to appeal for relief from over valuations of their property by assessors to the local board of equalization, and denied the rights and privileges accorded by the laws to all other persons in that respect.

22 XXVI.

System Adopted by said Board Violates Rules of Equality.

That the State board of equalization, in making said pretended assessment of the said roadway of defendant, did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors; and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated, and greater than its actual value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

That the value of such fences which were not the property of defendant, nor the property of the owners of said roadway, and the increased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and that there is no mode or means by which such illegal valuations can be separated from those which may be legal.

Defendant, upon its information and belief, avers that the said State board of equalization adopted a system of valuation in
23 respect to all the property mentioned and referred to in section 10 of article XIII of the constitution, which defines the power of said board, which system was by said board intended to and which did operate unequally, and which was intended to and did violate the rule prescribed by said section, that all of such property should be assessed at its actual value. That the system so adopted was applied by the said board in making said pretended assessment of the said property, and in making the assessment of all property in the State over which the pretended authority of said board extended.

That said system was to include within the value of the roadway the value of the fences owned and possessed by coterminous proprietors, and to value said roadway at double its actual value, because the right thereto was acquired by condemnation. That said system relative to the rolling-stock of railroads was to value the same at sixty per cent. above its actual cost when new, and to value such rolling-stock at double its actual value. That said system, relative to the franchise, was to value it at $2,000 per mile, when the actual value, as the board well knew, of said franchise, as an entirety, did not exceed twenty-five dollars. That said system, as to the valua-
24 tion of other property to be assessed by said board was to value it at double its actual value. That the said system was by the said board adopted, and was by it applied in making all assessments made by it, with the intent and purpose wrongfully and unlawfully to cause the persons and property assessed by it to pay

double the rate of State and county taxes paid by the owners of property assessed by the local authorities. And defendant avers, upon its information and belief, that the said board applied the said system in making the pretended assessment against the property upon which the taxes mentioned in the complaint are based. And defendant, upon its information and belief, avers that the said State board of equalization, in making said pretended assessment, did not value any of said property at its actual value, but did intentionally, and for the purpose of making defendant pay an unequal proportion of State and county taxes, assess the said property at double its actual value. And defendant avers that the general rule in this State has been to assess property at not over two-thirds its cash or actual value, and that this rule was adopted and acted upon by all local assessors in the State and by the said State board, except
25 in the exercise of the power conferred by section 10, article XIII, of the State constitution for the said fiscal year, and that all property, save that assessed by the said State board under said section, had been valued and assessed at one-third less than its actual value, and that the taxes have been collected on valuations so made.

XXVII.

Defendant's Franchise a Federal One.

And defendant, upon its information and belief, avers that under and by virtue of the said several acts of Congress defendant became, and ever since has been, a Federal corporation, and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXVIII.

Corporate Powers in part Derived from Acts of Congress.

And defendant, upon its information and belief, avers that if, by virtue of the several acts of Congress herein referred to, it did not become a Federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises
26 granted to it by the said several acts of Congress as the trustee of the said Government, and for the governmental uses and purposes specified in said acts.

XXIX.

That the Franchise of the Defendant is not Subject to State Taxation.

That under and by virtue of the said several acts of Congress hereinbefore referred to the plaintiff was, by the Government of the United States, selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said Government might, when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to

use the same; that the Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant. That such a tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay, and prevent the defendant from performing, as aforesaid, its obligations to the
27 United States, and would nullify and prevent the enforcement of the said several acts of Congress.

XXX.

Whole Franchise Assessed.

That the said pretended assessment made by the State board of equalization is upon the whole of the franchises of defendant, and that the said board, in valuing the same, included the value of all the franchises held and corporate powers exercised by defendant under said acts of Congress.

XXXI.

Tax upon the Franchise Blendid with Tax upon Other Property.

That the State board of equalization, in making said pretended assessment, included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but that such value is not separately stated in said apportionment, nor upon any assessment-roll or delinquent list of said county, but such value is in said pretended apportionment and upon the assessment-roll and delinquent list of said county blended with the values affixed
28 to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and that the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXXII.

Valuation Excessive.

That neither the franchise, roadway, road-bed, rails, or rolling-stock were assessed by the State board of equalization in said pretended assessment at their actual value, or in proportion to their value, but were wilfully and intentionally assessed greatly in excess and out of proportion to such value, and greatly in excess of, and out of proportion to, the rate at which all other property in said State is valued for the purposes of taxation, to wit, one hundred per cent. in excess thereof.

XXXIII.

Sole Authority Upon Which Tax is Based.

That said pretended assessment is the only assessment of said property, and the pretended tax, for non-payment of which this action is brought, is founded upon said pretended assessment, and upon no other assessment.

29 XXXIV.

County Tax not the Same in all Townships and Districts.

The defendant, upon its information and belief, avers that the tax levied by the board of supervisors for said fiscal year was not fixed at the same rate in every township and district in said county. And defendant, upon its information and belief, avers that said tax was levied by said board without authority of law, and that the same was illegally placed upon said assessment roll or book and delinquent list without authority. That upon the assessment-roll and delinquent list of said county the said several taxes, State, county, township, and district, are blended, and cannot be separated.

XXXV.

State Tax Void.

And defendant, upon its information and belief, avers that the State board of equalization never at any time did, for the said fiscal year, fix or determine any rate of taxation for State purposes, and that the sum and the whole thereof claimed in the complaint for State taxes for said fiscal year is illegal and void.

30 And for further and separate answer defendant avers:

XXXVI.

Plaintiff's Causes of Action Based upon Assessment by State Board of Equalization.

That on the 2d day of May, 1880, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of the railroad hereinbefore described and known as The Southern Pacific railroad against this defendant; that said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, and was then and there so entered upon the minutes of said board; that the said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property, or any part thereof.

31 XXXVII.

Property not Assessed to the Owner.

That at the time said pretended assessment was made Loyd Tevis and D. O. Mills were, and for more than three years prior thereto had been, the owners and claimants of all the franchises, roadway, road-bed, rails, and rolling-stock of said Southern Pacific railroad,

and of all the property, real and personal, against or upon which said pretended assessment was made; that said property was by the defendant duly and lawfully conveyed to the said Mills and Tevis on the first day of April, 1875, by a conveyance duly acknowledged and entitled to record and which was afterwards, to wit, within said year 1875, duly recorded in the proper book in the recorder's office in each of the counties into and through which said road runs or is situated; that said conveyance ever since has been, and still is, of record as aforesaid and in full force and effect; that under and by virtue of the provisions of section 863 of the Civil Code of California and the provisions of section 2924 of said code, as amended in 1874, said conveyance transferred to the said Mills and Tevis the whole estate of defendant in said property, and from thence hitherto,
32 by reason of said conveyance and said provisions of the said code, the defendant has had no estate or interest in said property, or any part thereof.

And defendant avers that at the time said pretended assessment was made the Central Pacific Railroad Company, a corporation duly organized and existing, was, and for more than three years prior thereto had been, in the full, open, and notorious possession and control of all of said property lying or being within the counties of Kern, Fresno, Tulare, Los Angeles, San Bernardino, and San Diego, or in either of said counties.

And defendant avers that at the time said pretended assessment was made the defendant was not, nor had it been for more than three years prior thereto, the owner or claimant of the said Southern Pacific railroad, or of any part or portion of the property upon or against which pretended assessment was made, nor was it at the time said pretended assessment was made, nor at any time within three years next preceding the time of the making of said pretended assessment, in the possession of, or control of, said property, or any portion thereof, situated within the said counties last above mentioned, or within either of them.

33 Wherefore, defendant prays it be hence dismissed, with costs.

GLASSELL, SMITH & PATTON,
Attorneys for Defendant.
CREED HAYMOND,
Of Counsel.

Verification.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

J. L. WILLCUT, being first duly sworn, on oath, says: That he is an officer, to wit: the secretary of the corporation defendant herein; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his own information or belief, and as to those he believes it to be true.

J. L. WILLCUT.

Subscribed and sworn to before me this 31st day of March, A. D. 1882.

CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

34 Due service of the within answer admitted this eleventh day of April, 1882.

SMITH, BROWN & HUTTON,
Attorneys for Plaintiff.

Filed April 11, 1882.

Bill of Exceptions.

Title of court and cause.

Be it remembered that on this the 9th day of July, 1883, the plaintiffs in this case, after due notice to the defendant, moved the court to set the case for trial, and thereupon the defendant objected to the said motion on the ground that this court had no jurisdiction of the case since the filing of the petition and bond for the transfer of the case to the circuit court of the United States, and at the same time moved the court to proceed no further in the case.

Thereupon the defendant's counsel, in support of their said objection and motion, read the petition herein filed on the 11th day of April, 1882, and the accompanying bond, both of which are on file, and are marked respectively Exhibit A and Exhibit B, and are made a part of this bill of exceptions, and also the pleadings in the case.

35 It was admitted by the attorneys for the plaintiff that a copy of the record, petition, and bond certified by the clerk of this court in the manner provided by law was entered in the circuit court of the United States, in and for the ninth circuit, district of California, prior to the first day of its then next session.

The plaintiff then read—in resisting the defendant's motion—the opinion and order of this court, filed April 22d, 1882, which is marked "Exhibit C" and is made a part of this bill of exceptions.

Thereupon the court overruled the motion of the defendant, and its objection to the motion of the plaintiff, and the defendant then and there excepted to each ruling.

The foregoing bill of exceptions was presented by the defendant at the time of the rulings referred to, and has been settled and is allowed.

V. E. HOWARD.

Dated this 9th day of July, 1883.
Filed July 9, 1883.

EXHIBIT A.

Title of court and cause.

To the honorable the superior court in and for the county of Los Angeles, State of California:

Your petitioner, The Southern Pacific Railroad Company, defendant, respectfully shows:

36 That your petitioner is the sole defendant in the above-entitled action now pending in this honorable court.

That said action was brought on the 10th day of March, 1882, the complaint therein having been duly filed on said date.

That the defendant has on this day and before the filing of this petition appeared in said action and filed an answer to the complaint of plaintiff.

That no term of this court has been held since this action, and this petition is filed before the term at which the cause could be first tried.

That no trial of said action has been had, and this petition is filed before the trial thereof.

That said action is a suit of a civil nature at law and arising under the Constitution and laws of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum and value of five hundred dollars.

That said action is brought by the plaintiff to recover from the defendant on account of taxes claimed by the plaintiff to be due and payable from the defendant for State and county purposes, as will more fully appear by a reference to the plaintiff's complaint on file herein.

37 That the assessment described in the complaint and answer, and which the plaintiff in this action claims to be due and payable, is an assessment which the State board of equalization of the State of California pretended to make under and by virtue of the authority conferred upon the board by section 10 of article XIII of the State constitution.

That the defendant claims in this action that said provisions of the constitution of the State of California, and the authority thereby conferred upon said State board of equalization, violate the provisions of the Fourteenth Amendment to the Constitution of the United States in this, that its effect is to deprive defendant of its property without due process of law, and that under it the defendant is denied any protection from the general laws of the State of California, which—

First. Require that property shall be taxed in proportion to its value;

Second. Require such proportions to be ascertained by a general law;

Third. Require, before the liability is fixed, that the right to be heard must be given;

Fourth. Which give an appeal from the assessor to another tribunal;

Fifth. Require the assessment to be made in the county and prevent its being made in localities distant from the *situs* of the property;

38 Sixth. Prescribe the mode and manner of the assessment, and—

Seventh. Which allow deductions from indebtedness secured by mortgage.

Eighth. Which requires property to be assessed at its actual value.

That in the assessment and apportionment described and mentioned in the answer the franchise of the defendant, and the whole thereof, is included in the valuation, and so blended with the other assessments and valuations that it cannot be distinguished therefrom, and defendant claims in this action that under and by virtue of the acts of Congress of July 27th, 1866, and March 3d, 1871 (which acts are referred to in said answer), the defendant was, by the Government of the United States, selected as an instrument and means of that Government to carry into execution the said several acts of Congress; and defendant further claims in this action that, under and by virtue of said several acts of Congress, the State has no power to impose a tax upon the franchise or operations of defendants, and that such tax violates the provisions of said several acts of Congress.

That prior to the 1st day of January, 1881, the defendant
39 was indebted to divers persons, citizens of the United States, and many of them then and now citizens and residents of the State of California, and others of them then and now citizens and residents of other States of the Union, in large sums for moneys advanced to construct and equip its railroad described in the answer herein. That to secure the payment of such indebtedness the defendant, long prior to the said day, executed and delivered a mortgage upon its railroad and all rolling-stock and appurtenances. That said indebtedness exceeded, and still exceeds, three thousand dollars per mile of said road. That no part thereof has ever been paid except the accruing interest, and that the whole thereof is now, and since the execution of said mortgage has been, a valid and subsisting indebtedness against said company defendant, and has been and still is secured by said mortgage.

That the said pretended assessment made as aforesaid by said State board of equalization included the whole value of said property, without any deduction therefrom. That under the constitution of the State of California, when property, other than property such as is described in the complaint, is assessed and valued for the purposes of taxation, it is the duty of the assessor making
40 such valuation to deduct from the value of such property all indebtedness secured by mortgage or lien upon the property. That the supreme court of the State of California, the highest tribunal in said State, has decided that defendant (and others similarly situated) is not entitled to the protection of the Fourteenth Amendment of the Constitution of the United States, is not a means or instrument of the Federal Government; that its franchise is assessable and subject to taxation without the consent of the Federal Government, and that defendant and others simi-

larly situated are not entitled to the reduction hereinbefore referred to. That said decision of the supreme court of the State of California is in full force, and is binding upon the inferior courts of the State, and especially upon this court. That the facts stated in the answer herein are true, which answer defendant refers to and makes part of this petition. That defendant is the corporation mentioned in the said several acts of Congress hereinbefore referred to, and that the railroad of defendant, which has been assessed by the State board of equalization, is the road constructed, operated, and maintained by defendant under the said several acts of Congress. That the plaintiff in said action will rely upon the decision of the
41 supreme court of the State of California, and that the construction of said several acts of Congress, and of the 14th Amendment to the Constitution of the United States, is in this action disputed, and must necessarily be adjudged and determined herein, and that if said adjudication and determination be in favor of defendant and against that heretofore made by the supreme court of the State of California, such adjudication and determination will be conclusive in favor of defendant upon the merits of this action. That this is a suit arising under the Constitution and laws of the United States.

That your petitioner has made and filed with this petition a bond in the penal sum of five thousand dollars, with good and sufficient surety, conditioned that your petitioner shall enter in the circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, and also shall appear in said circuit court and enter special bail in said suit, if special bail was originally requisite therein, and shall do all such other and further appropriate acts as by the act of Congress, approved
42 March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," are requisite to be done upon removal of a suit in a circuit court of the United States from a State court, and your petitioner is ready and willing to give such other and further bonds, and to do all such other acts as may be lawfully required.

Your petitioner therefore prays that this honorable court will accept this petition and said bond, and proceed no further in said suit, and that the said suit may be removed into the circuit court of the United States in and for the district of California, in the ninth circuit, as required by statute of the United States in such cases made and provided.

And your petitioner will ever pray, etc.

GLASSELL, SMITH & PATTON,
Attorneys for Petitioner.
CREED HAYMOND, *Of Counsel.*

Filed April 11, 1882.

43 EXHIBIT B.

Title of court and cause.

Know all men by these presents that we, The Southern Pacific Railroad Company, as principal, and Charles Crocker and Leland Stanford, as sureties, are held and firmly bound unto The People of the State of California, plaintiff, in the sum of five thousand dollars, to be paid to the said plaintiff, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of March, 1882.

Whereas the above-entitled action was brought on or about the 10th day of March, 1882, in the superior court in the county of Los Angeles, State of California, and the same is now pending in said superior court by The People of the State of California against said Southern Pacific Railroad Company, and is removable into the circuit court of the United States in and for the district of California, in the ninth circuit, under and by that certain act of Congress
44 of the United States, approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

And whereas said The Southern Pacific Railroad Company has made, and is about to file herewith, its petition in said suit in said superior court in and for the county of Los Angeles, State of California, for the removal of said suit into said circuit court of the United States to be held in and for the said district of California, in the ninth circuit:

Now, the condition of this obligation is such that if said The Southern Pacific Railroad Company shall enter into such circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also shall there appear and enter special bail in such suit if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said acts of Congress are required to be done upon the removal of a suit from a State court into the circuit court of the United
45 States, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] SOUTHERN PACIFIC RAILROAD CO.,
By J. L. WILLCUTT, *Secretary*.
[SEAL.] CHAS. CROCKER.
[SEAL.] LELAND STANFORD.

STATE OF CALIFORIA,)
City and County of San Francisco,) ss:

Charles Crocker and Leland Stanford, the sureties in the foregoing obligation, being each duly sworn, each for himself, says: That he is a resident of the State of California and a freeholder therein, and

is worth the sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

CHAS. CROCKER.
LELAND STANFORD.

Subscribed and sworn to before me, this 31st day of March, 1882.
[SEAL.] CHARLES J. TORBERT,
Notary Public.

Filed April 11, 1882.

46 EXHIBIT C.

Title of court and cause.

This is a suit by the people against the railroad for the recovery of $31,479.58 for delinquent taxes, assessed for the year 1880–'81, with 5 per cent. for non-payment and costs of court.

The defendant filed an answer and petition, and moved to remove the cause to the circuit court of the United States, on grounds hereafter stated:

THE PEOPLE, etc., *vs.* S. P. R. R. Co. } No. 1401.

The following is the entry in the minutes of the clerk of the court: "Attorneys for defendant move the court to approve the bond filed in this case as to the sufficiency of the sureties, the amount and form."

To which plaintiff's attorneys object on the ground that this case, under the law, cannot be transferred to the United States court, and such being the case, the court has no jurisdiction to pass on the bond.

Defendant's attorneys offer, in case the bond is objected to by the court for insufficiency, or form, or amount of sureties, to file a new bond in such form, and in such amount, and with such sureties, as may be satisfactory to the court.

47 Submitted and taken under advisement.

It will be seen that the motion in this case is not in form for a transfer of the case to the Federal court, but for the approval of the bond as to form and amount of the security.

If the motion were to transfer I should not hesitate to approve the bond as to form and security; but I think it clear the court can only approve of the bond as an incident of the application to transfer, in a proper case for removal under the act of Congress, and as that is not the order demanded, I decline to approve the bond, on the ground of a want of jurisdiction to approve. The mere presentation of a petition and bond does not make a case for removal to the United States court. The supreme court of New Jersey, in the recent case of the National Union Bank *vs.* Dodge, 11 Reporter, 641, 13 Vroom, held: "If the cause be one of which the Federal court had not jurisdiction under the act of Congress, or the proceedings to remove it are not in compliance with the requirements of the statute, the State court re-

tains its jurisdiction over the suit, notwithstanding a petition and bond be filed for its removal."

In the late case of Myer *vs.* Construction Company, the Su-
48 preme Court of the United States said: "We fully recognize the principle heretofore asserted in many cases, that the State court is not required to let go its jurisdiction until a case is made, which, upon its face, shows that the petitioner can remove the case as of a matter of right."

The petition must, therefore, show on its face competent parties and a subject-matter of which the Federal court would have jurisdiction.

The petition in this case for removal shows that both plaintiff and defendant are citizens of the State of California.

The answer, which is claimed by the petition for removal to be made a part of it, both as to the statement and affidavit, alleges: "Defendant, a corporation existing under the laws of the United States and of the State of California, as will hereafter more fully appear; that the principal place of business of defendant now is, and for many years past has been, in the city of San Francisco, State of California; that a great number of its stockholders now are and ever have been citizens of the United States, and residents of said State of California, while others of its stockholders now are and ever have been citizens of the United States, and residents of States other than the State of California."

49 It is held by the Supreme Court of the United States, in the Louisville, Cincinnati and Charleston Railroad Company *vs.* Lisson, 2 Howard, 497, that "A corporation created by the laws of a State, and having its place of business within that State, must, for the purpose of suit, be regarded as a citizen within the meaning of the Constitution, giving jurisdiction founded upon such citizenship."

This decision was re-affirmed by that Court in 1868, in the case of Cowles *vs.* Mercer county, 7th Wallace, 118, and has been regarded as settled law in all courts ever since.

"The petition for removal must allege that all the defendants uniting in the petition are of a different citizenship from the plaintiff." 11 Reporter, 423, Smith *vs.* Horton.

This is a case in which all the defendants are indispensable parties under the act of 1875, and cannot be removed. Blake *vs.* McKim, 11 Reporter, 727, United States circuit court, Harlan, J.

The case can only be regarded as an application to remove a suit between resident citizens of the same State.

It is claimed that this case should be removed to the U. S.
50 circuit court, because the defendant is a corporation chartered by Congress, is an instrument of the Federal Government, and therefore exempt from taxation by the State.

It does not appear that the defendant was incorporated by an act of Congress. The various acts of Congress claimed as incorporating the railway are made a part of the petition, and contradict its statement as to the incorporation.

By sec. 18 of the act of the act of Congress approved April 27th, 1866, it is provided:

"That the Southern Pacific railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, should have similar grants of land, subject to all conditions and limitations herein provided, and required to construct its road on the like regulations as to time and manner, with the Atlantic and Pacific reservation provided for."

In the act of Congresss incorporating the Union Pacific,
51 July 1st, 1862, in the ninth section of said act, it is provided:

"That the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act."

The third section grants certain sections of land to the companies to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, etc. The fifth section provides for the issue of bonds to the companies, or a subsidy for the same purpose.

As the answer and the petition refer to the acts of Congress granting subsidies to the defendant, and make them a part of the application, the court must regard them in that light. The acts
52 of Congress refer to the Southern Pacific railroad as an existing corporation under the laws of California at the time of the grant to the railroad; it must be held that it was a regularly organized corporation of the State at that time. It was not, therefore, a corporation created by the act of Congress, and was not, in consequence, an instrument of the Federal Government, created by Congress for the execution of the purposes of the National Government. To hold that the State government could create such an instrument would be to decide that the State government had power to add at pleasure to the powers of the National Government. This question was presented and decided in the case of Thompson *vs.* Pacific railroad, to restrain the collection of taxes imposed on a railway organized by the Legislature of Kansas. The court held that the railroad, as a State corporation, was liable to State taxation. The opinion was rendered by Chief Justice Chase, 9th Wallace, 586. The Court distinctly decided that "Although, confessedly, Congress

may constitutionally make or authorize contracts with individuals or corporations for services to the Government; may grant aid by money or land in preparation for and in the performance of such service; may make any stipulations and conditions in relation to such aids
53 not contrary to the Constitution, and may exempt, in its discretion the agencies employed in such services from any State taxation which will really prevent or impede the performance of them, yet in the absence of all legislation on the part of Congress to indicate that such an exemption is deemed by it essential to the full performance of the party's obligation to the Government, the exemption cannot be applied to the case of a corporation deriving its existence from State law, and holding its property within State jurisdiction and under State protection only because of the employment of the corporation in the service of the Government."

Upon the justice of the claim of exemption from taxation by the State Judge Chase remarks: "The nature of the claim to exemption which is advanced in behalf of the complainants in the case before us—the very ground of the claim is the bounties of the General Government. The allegation is that the Government has advanced large sums to aid in the construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, in-
54 dependently of those grants, and will admit the Government to a very limited and wholly contingent interest in remote net income."

Such are almost identically the allegations in the petition and answer of the case at bar.

In the case of the National Bank *vs.* Commonwealth, claiming exemption from taxation, 7 Wallace, 352, the same court held: "The doctrine which exempts the instrumentalities of the Federal Government from the influence of State legislation is not founded on any express provision of the Constitution, but in the implied necessity for the use of such instruments by the Federal Government. A State law requiring the national banks to pay the tax which is rightfully laid on the shares of its stock is valid under this limitation of the doctrine."

The case of the Railroad Company *vs.* Pensiston, 18 Wallace, 7, presented the case of a corporation chartered by Congress by act of July, 1862. The grants to the company by Congress were upon condition that the company shall first pay the bonds of the United States at maturity; second, keep their line and road in repair and use; third, transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon said railroad for the Government, and giving the Gov-
55 ernment the preference, at fair and reasonable rates of compensation, not exceeding those charged to private individuals, the amount thus earned to be applied in payment of the bonds, as well as 5 per cent. of the net earnings of the road after its completion. The court held, as there was no act of Congress expressly exempting the road, its property was liable to State taxation.

Mr. Justice Strong delivered an exhaustive opinion on the case, and, speaking of the case of Thompson *vs.* The Union Pacific Railway Company, said: "There is no difference that can be pointed out between the nature, intent, or purposes of their agency and those of the corporation complainants in the present case; yet, as we have said, a State tax upon the property, its road bed, rolling stock, and personality in general was ruled by this court not in conflict with the Federal Constitution. It may therefore be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the State in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of
56 the property within the State is employed in the execution of the business of the Government. It belongs to governmental agents, and it is not only used, but necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards, and multitudes of manufacturing establishments. They are the property of natural persons or corporations, who are instruments or agents of the General Government, and they are the hands by which the objects of the Government are attained. Were they exempt from liability to contribute to the revenue of the States, it is manifest the State governments would be paralyzed."

For the purpose of the decision it is therefore immaterial whether the defendant was incorporated by the State or by an act of Congress. It is argued by the defendant, and so alleged, that the taxes in this case, as levied, is in conflict with the 14th amendment of the Constitution of the United States, but the facts as set out contradict the assumption. As construed by the Supreme Court of the United States, the 14th amendment is limited to legislation against the colored race.

In the slaughter-house cases, 16 Wallace, the court says:
57 "We doubt very much whether any action of a State not directed by way of discrimination against negroes as a class, or against their race, will ever be held to come within the purview of its provisions."

The various objections to the assessment of the tax under the State law are not Federal cognizance, do not call in question the construction of the Constitution of the United States, nor any act of Congress within the meaning of the act of 1875, and afford no ground for the transfer of these tax cases to the Federal court. The application to approve the bond in this case is denied, and the proceeding to transfer the cause to the federal court dismissed.

V. E. HOWARD,
Judge of said Court.

Dated April 22d, 1882.
Filed April 22d, 1882.

Judgment.

Title of court and cause.

This cause was, on the 18th day of September, 1883, both parties being present in open court by their respective counsel, set for trial for the 24th day of September, 1883, at 10 o'clock, a. m., of said day.

58 This cause came on regularly for trial on the 24th day of September, 1883, Smith, Brown & Hutton, Esqs., and S. M. White, Esq., appearing as counsel for plaintiff, and Glassell, Smith & Patton, Esqs., counsel for defendant, failing to appear, the court had them called, and A. Glassell, Esq., of counsel for defendant, appearing in open court, was notified by the court that the trial of said cause was about to begin, but the said counsel for defendant then and there declined to participate in the trial of said cause, and withdrew and absented himself from the court-room, and no counsel appeared for defendant during the trial of said cause.

The cause was tried by the court, sitting without a jury, whereupon A. E. Sepulveda and B. A. Yorba were examined as witnesses on the part of the plaintiff, and documentary evidence was also introduced by plaintiff, and the defendant failing to introduce any evidence whatever, and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon, it appearing to the court that defendant had had due notice of the assessment made against its property by the State board of equalization, of the State of California, and findings

59 of fact having been duly waived by the respective parties, it was by the court ordered that judgment be entered in favor of the plaintiff, in accordance with the prayer of plaintiff's complaint, and for the sum of three thousand one hundred and forty-seven dollars for attorneys' fees.

Wherefore it is ordered and adjudged that The People of the State of California, the plaintiff, do have and recover of and from The Southern Pacific Railroad Company, the defendant, the sum of thirty-one thousand four hundred and seventy $\frac{58}{100}$ dollars, State and county taxes for the fiscal year 1880–'81, and one thousand five hundred and seventy-three $\frac{50}{100}$ dollars, the five per cent. added for the non-payment of such taxes, and fifty cents, costs of collection, and three thousand one hundred and forty-seven dollars, attorneys' fees, amounting in the aggregate to the sum of $36,191.58, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of thirty-two $\frac{40}{100}$ dollars.

Judgment rendered October 29th, 1883.

V. E. HOWARD,
Judge of the Superior Court.

Filed Oct. 29, 1883.

60 *Notice of Appeal.*

Title of court and cause.

You will please take notice that the defendant in the above-enti-

tled action, The Southern Pacific Railroad Company, hereby appeals to the supreme court of the State of California from the judgment heretofore, to wit, on the 29th day of October, 1883, rendered and entered therein in favor of the plaintiff in said action and against the said defendant and from the whole thereof.

Dated this 6th day of November, 1883.

GLASSELL, SMITH & PATTON,
Attorneys for Defendant.

To the clerk of said superior court and to Messrs. Smith, Brown & Hutton and Stephen M. White, Esq., attorneys for the plaintiff.

Due service and receipt of a copy hereof, after filing, admitted this 6th day of November, A. D. 1883.

SMITH, BROWN & HUTTON,
S. M. WHITE, *Attorneys for Plaintiff.*

Filed November 6th, 1883.

61 *Stipulation.*

Title of court and cause,

We hereby stipulate and certify that the foregoing transcript on appeal is correct and that the documents therein appearing are true copies of the complaint, answer, bill of exceptions, exhibits A, B, C, and judgment—which said documents constitute the judgment roll in said case—and the notice of appeal, with the endorsements thereon.

And we further stipulate and certify that an undertaking on appeal in due form has been properly filed.

SMITH, BROWN & HUTTON, AND
STEPHEN M. WHITE, *District Attorney,*
Attorneys for Plaintiff and Respondent.
GLASSELL, SMITH & PATTON,
Attorneys for Defendant and Appellant.

62 Service accepted by copy this — day of —— 1883.

——— ———,
Attorneys for Respondent.

63 *Submission of Cause.*

In the Supreme Court, State of California. Department Two.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent,
vs.
SOUTHERN PACIFIC RAILROAD CO.

APRIL 14, 1883.

Argued and respondent allowed 10 days to file brief, appellant 10 days to reply, cause to be therein submitted.

Title of court and cause.

MAY 15, 1883.

Filed appellant's brief and submitted.

Title of court and cause.

AUG. 28, 1884.

Judgment affirmed.

THORNTON, *J.*

We concur.

SHARPSTEIN, *J.*
MYRICK, *J.*

64 Title of court and cause.

SEPT. 8, 1884.

Filed petition for rehearing.

L. A.

Title of court and cause.

SEPT. 17, 1884.

Rehearing denied.

The COURT.

65 *On Appeal from the Superior Court in and for the County of Los Angeles.*

In the Supreme Court of the State of California. Department Two.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Appellant. } No. 9340.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Thornton, J.

We concur.

SHARPSTEIN, *J.*
MYRICK, *J.*

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of Los Angeles in the above-entitled cause be, and the same is hereby, affirmed, with costs.

66 *Department Two. Filed August* 28, 1884.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE S. P. R. R. CO. } No. 9340.

This action was brought in the superior court of Los Angeles county by the people of the State of California against the railroad company above named to recover State and county taxes levied and assessed for the fiscal year 1880–'81, etc. The defendant filed its answer and a petition and bond to have the case removed for trial to the circuit court of the United States for the 9th circuit. The

bond was in form in accordance with law. The petition made the answer a part of it. The answer set forth many defenses under the State law, and also defenses under the Fourteenth Amendment of the Federal Constitution. The court below refused to approve the bond, proceeded to try the cause, and rendered judgment for the plaintiff.

The question is here presented whether the Federal Constitution and the act of Congress authorized a removal of an action from a State to a Federal court brought by the State to recover taxes levied under its laws on the property of a being created by its power in one of its own courts. The removal of the cause if authorized by the Constitution and laws of the United States involves the trial of every question which may arise in it, whether involving questions of State or Federal law. We nowhere find a provision in the acts of Congress that should the Federal court decide that the Federal questions are not maintainable, that the case is to be remanded to the State court, that the questions of State law may there be decided, but the Federal tribunals retain the case and proceed to pass on every question, whether arising on the enactments of the State Legislature or the Federal Constitution and acts of Congress.

We do not feel authorized to hold that the court below in not approving the bond offered by defendant and in going on with the case erred in a suit like this by the State in one of its courts to recover taxes levied and assessed under its laws, until it has been held by the highest judicial tribunal of the United States that the removal of such a suit is authorized under the Constitution and laws of the United States.

Judgment affirmed.

THORNTON, *J.*

We concur:

SHARPSTEIN, *J.*
MYRICK, *J.*

67 In the Supreme Court of the United States of America, of October Term, in the year of our Lord one thousand eight hundred and eighty-five.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

In Error.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Southern Pacific Railroad Company, by ——, its attorney, and says that in the record and proceedings aforesaid there is manifest error
68 in this, to wit: That the complaint in the action aforesaid filed in the superior court of the county of Los Angeles, State of California, and the matters therein contained are sufficient in law for the said The People of the State of California to have or maintain its aforesaid action thereof against the said The Southern Pa-

cific Railroad Company; there is also error in this, to wit: That by the record aforesaid it appears that the case was one arising under the Constitution and laws of the United States, and that the defendant at the same time that it first appeared and filed its answer in said case, to wit, on the eleventh day of April, 1882, filed its petition in due form for a removal of the said case to the circuit court of the United States in and for the ninth circuit, district of California, and also a bond with good and sufficient surety, conditioned as required by law; which bond was accepted and approved by the said superior court, and that
69 thereby the said superior court lost all jurisdiction of the case; there is also error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid given, was given for the said The People of the State of California against the said The Southern Pacific Railroad Company, whereas, by the law of the land, the said judgment ought to have been given for the said The Southern Pacific Railroad Company against the said The People of the State of California, and that upon an appeal from the said judgment to the supreme court of the State of California, the said judgment was affirmed, whereas, by the law of the land it should have been reversed; and the saidThe Southern Pacific Railroad Company prays that the judgment of the supreme court aforesaid, affirming the judgment of the superior court aforesaid, and the judgment of the superior court thereby affirmed may be reversed, annulled, and altogether held for nothing; and that it may be restored
70 to all things which it hath lost by occasion of the said judgment & ct.

GLASSELL, SMITH & PATTEN,
Attorneys for Plaintiff in Error.

Endorsed: Filed October 25, 1884. J. W. McCarthy, clerk, by Frank Myers, deputy.

71 Know all men by these presents that we The Southern Pacific Railroad Company, a corporation duly organized and existing in the State of California, as principal, and Chas. F. Crocker and George E. Gray, as sureties, are held and firmly bound unto the People of the State of California, in the full and just sum of seventy-five thousand (75,000) dollars, to be paid to the People of the State of California, their proper officers or assigns, to which payment well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 14th day of October, A. D. 1884. Whereas, lately at a term of the supreme court of the State of California, held on the 28 day of August, A. D. 1884, in a suit depending in said court, between the aforesaid The People of the State of California, as plaintiff, and the aforesaid Southern Pacific Railroad Company, as defendant, judgment
72 was rendered against said defendant.

And said defendant having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the said judgment in the aforesaid suit, and a citation directed to said

plaintiff in said suit, citing and admonishing the said plaintiff to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1885.

Now the condition of the above obligation is such that if the aforesaid defendant in said suit shall prosecute the said writ of error, to effect and answer all damages and costs, if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
By J. L. WILLCOTT, *Secretary.*
CHAS. F. CROCKER. [SEAL.]
GEO. O. GRAY.

Signed, sealed and delivered in the presence of—
CHARLES F. TORBERT.

73 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

Chas. F. Crocker and George E. Gray, the sureties in the foregoing obligation, being each sworn, each for himself says: That he is a resident of the State of California and a freeholder therein, and is worth the sum of seventy-five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

CHAS. F. CROCKER.
GEO. E. GRAY.

Subscribed and sworn to before me, this 14th day of October, A. D. 1884.

[SEAL.] CHAS. J. TORBET,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is hereby approved, this 16th day of October, A. D. 1884.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

74 Indorsed: Filed October 25th, 1888. J. W. McCarthy, clerk, by Frank Myers, deputy.

75 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you, between The Southern Pacific Railroad Company, defendant and plaintiff in error, and The People of the State of California, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said Southern Pacific Railroad Company, as by its complaint appear, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done

to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the first Monday of October next, in the said United States Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[U. S. Circ't C't, Seal.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court, 9th Circuit, District of California.
By F. D. MONCTON,
Deputy Clerk.

The above writ of error is hereby allowed.

B. F. MORRISON,
Chief Justice.

76 [Endorsed:] 9340. United States Supreme Court. Southern Pacific Railroad Company, pl'ff in error, *vs.* The People of the State of California, def't in error. Copy of writ of error. Lodged in the clerk's office of the supreme court of the State of California for the above-named defendant in error. Filed October 25, 1884, J. W. McCarthy, clerk, by Frank Myers, deputy.

77 UNITED STATES OF AMERICA, *ss:*

To the people of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 2nd Monday of October, A. D. 1885, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein the Southern Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of October, A. D. 18—, and of the Independence of the United States the one hundred and ninth.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

78 STATE OF CALIFORNIA,
County of Los Angeles:

On this 16th day of October, 1884, personally appeared before me, the subscribed Andrew Glassell, who, being duly sworn, makes oath that he delivered a true copy of the within citation to Smith, Brown & Hutton, and Stephen M. White, the attorney of record for the said The People of the State of California, at the said county of Los Angeles, on the 16th day of October, 1884.

Sworn to and subscribed this October 16th, 1884, before me.

JOHN W. McCARTHY, *Clerk*,
By JOHN T. GAFFEY, *Deputy*.

Service of a copy of within citation is hereby admitted this 16th day of October, 1884.

E. C. MARSHALL,
Att'y Gen'l.

[Endorsed:] United States. 9340. Southern Pacific Railroad Company, pl'tf in error, *vs.* The People of the State of California, def't in error. Citation. Filed October 25, 1884. J. W. McCarthy, by Frank Myers, deputy.

79 *Clerk's Certificate.*

In the Supreme Court of the State of California.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error. } 9340.

I, J. W. McCarthy, clerk of the supreme court of the State of California, do hereby certify that the foregoing seventy-seven pages, numbered from one to seventy-seven, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 29th day of January, 1885.

[Supreme Court of California.]

J. W. McCARTHY, *Clerk*,
Per J. WILLIAMS, *Deputy*.

Endorsed on cover: California supreme court. No. 841. The Southern Pacific Railroad Company, plaintiff in error, *vs.* The People of the State of California. Filed April 9th, 1885.

118-109

Part of Transcript inadvertently omitted by the clerk in the court below but supplied by stipulation between counsel.

SUPREME COURT OF THE UNITED STATES.

No. 841.

THE SOUTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

FILED 1885.

1 *Order.*

In the Superior Court of Los Angles County, State of California.

PEOPLE OF STATE OF CALIFORNIA, Plaintiff,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, Defendant.

The order heretofore entered in this case is modified so as to read as follows:

"In this case the court, upon the ground stated in its opinion heretofore filed, denies the petition of the defendant to transfer the case to the U. S. circuit court. So far as the two sureties on the bond filed are concerned, the court is satisfied with their sufficiency."

A full, true, and correct copy of the minutes of the superior court, Hon. V. E. Howard, judge, of April 24th, A. D. 1882.

Witness my hand and seal of said court, this 12th day of May, 1884.

[SEAL.] A. W. POTTS, *Clerk*,
By B. E. TANEY, *Deputy*.

2 We hereby certify and stipulate that the attached document is a true copy of an order made by the superior court of Los Angeles county, on the 24th day of April, 1882, in the case then pending in that court of The People of the State of California *vs.* The Southern Pacific Railroad Company; and of a certified copy of said order afterwards filed in the supreme court of the State of California as a part of the record on appeal in said case; and that the clerk of said supreme court may certify the same as a part of the record in said case.

We further certify and stipulate that the said order properly constitutes part of the record in the case now pending in the Supreme Court of the United States (No. 841) entitled The Southern Pacific Railroad Company, plaintiff in error, *vs.* The People of the State of California, and that the same may be filed therein as such.

SMITH, BROWN & HUTTON,
Attorneys for Plaintiff and Respondent.
GLASSELL, SMITH & PATTON,
Att'ys for D'f't & Appellant.

3 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant and Appellant.

I, J. W. McCarthy, clerk of the supreme court of the State of California, do hereby certify that the foregoing printed document, as

corrected in manuscript, is a true copy of a certified copy of an order of the superior court of Los Angeles county filed in this case by leave of court upon suggestion of a diminution of the record and constituting part of the record in the above-entitled case in this court.

Witness my hand and the seal of the said supreme court, this 17th day of November 1885.

[SEAL.]

JOHN W. McCARTHY, *Clerk.*
By JOHN T. GOFFEY, *Deputy.*

118-109

Office Supreme Court U. S.
FILED.
DEC 11 1885
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 841.

THE SOUTHERN PACIFIC RALROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF.

GEORGE H. SMITH,
Attorney for Plaintiff in Error.

S. W. SANDERSON,
Of Counsel.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

No. 841.

THE SOUTHERN PACIFIC RALROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of California.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action brought in the superior court of the county of Los Angeles by the people of the State of California to recover from the defendant, a railroad corporation, the State and county taxes for the fiscal year 1880–'1.

The complaint (which is in the form prescribed by § 3900 of the Political Code of California) simply alleges "that the defendant is indebted to plaintiff in the sum of $31,470.58, State and county taxes for the fiscal year 1880–'1, with five per cent. added for the non-payment of such taxes and $\frac{50}{100}$ for the costs of collection to date," and demands judgment for said several sums, &c. (*Trans., p.* 1).

The answer of the defendant, besides denying the allegations of the complaint and pleading other matters, which, under the laws of the State, would render the tax sued for void, alleges in effect (among other things)—

1st. That the road of the defendant was constructed under the act of Congress of July 27th, 1866, known as the Atlantic and Pacific act (14 Stat. at Large, 292), and the act of March 3d, 1871, known as the Texas Pacific act (16 *Id.*, 573), and the supplementary act of May 2nd, 1872 (17 *Id.*, 59, *Trans., pp.* 2–5); that it holds, under the Government of the United States, the corporate powers and franchises granted to it by the acts of Congress referred to, as the trustee of the said Government, and for the governmental uses and purposes specified in the acts; that it was by the said acts selected by the Government of the United States as the means and instrument of that Government to construct its railroad and to keep and maintain it in repair, to the end that the Government might, when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as it might, in the exercise of its powers, desire to use it for; that the Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant, and that such a tax would hinder, delay, and prevent the defendant from performing its obligations to the Government, and would nullify and prevent the enforcement of the said several acts of Congress, but that the State Board of Equalization in making its assessment included and assessed the franchises held and corporate powers exercised by the defendant under said acts of Congress, and so blended the value thereof with the values of the roadway and other

property of the defendant that it cannot be distinguished or separated therefrom (*Trans., pp.* 11, 12).

2nd. That at and before the time of the assessment the railroad of the defendant, with its rolling-stock and other appurtenances, was subject to a mortgage, securing an indebtedness of over $3,000 per mile of the road, due to various parties, citizens of the United States, and some of them citizens of the State of California (*Trans. p.* 5); that in making the assessment the State Board of Equalization did not deduct the amount of the mortgage, but assessed the property of the defendant at its full value without any deduction therefor (*Trans. p.* 7); that the assessment was thus made under the provisions of § 4, Art. XIII, of the constitution of California, which at the same time provided, with reference to all other property than railroads operated in more than one county, that the value of mortgages existing should be deducted from the actual value of the property, and the owner assessed only for the balance, and that this is a discrimination against the owners of railroads operated in more than one county, and consequently in contravention of the Fourteenth Amendment to the Constitution of the United States (*Trans. p.* 9).

3rd. That under the Constitution and laws of California boards of equalization are established in the several counties, which are empowered to equalize the assessments of all property except railroads operated in more than one county; to which the owners of all property assessed, with the exception stated, have the right and privilege to apply for the correction of their assessments, but that by the constitutional provision of the State above referred to the owners of rail-

roads operated in more than one county are, in contravention of the Fourteenth Amendment, denied this privilege.

4th. That the powers conferred upon the State Board of Equalization are in contravention of the Fourteenth Amendment also in this: that no provision is made for personal or other notice to the parties to be affected by the exercise of such powers, or for any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights (*Trans. p.* 8), thus depriving it of its property without due process of law and of the equal protection of the laws, which require notice to all others.

The answer, petition, and bond (with the exception of names, dates and amounts) are literally identical with those in the case of *San Mateo County* vs. *Southern Pacific Railroad Company* (reported in 7 Sawyer, 238, and 8 *Id.* 238) and in the *Santa Clara* and other *Railroad Tax Cases* (reported in 9 Sawyer, 165).

At the same time with the answer a petition for the removal of the suit into the United States circuit court, accompanied with a proper bond, was filed in the State court (*Trans., pp.* 16, 19), and the court refused to transfer the case, but approved the bond.*

A copy of the record, petition, and bond, duly certified, was entered in the circuit court prior to the first day of its then next session. (*Trans., p.* 15, *folio* 35.)

Afterwards the plaintiff moved to set the case for trial in

* The order appearing in the transcript on page 24 (fo. 57) was modified by a subsequent order of the court, which seems to have been omitted by the clerk from the record in his return. To supply the omission we will ask leave to file the order certified by the clerk and accompanied with the stipulation of the plaintiff's attorney that the same is properly a part of the record and may be filed as such.

the State court, and thereupon the defendant objected to the motion on the ground that the court had no jurisdiction of the case after the filing of the petition and bond for the transfer of the case to the United States circuit court, and at the same time moved the court to proceed no further in the case; but the court overruled the motion of defendant and its objection to the motion of the plaintiff. (*Trans., p.* 15.)

Afterwards the case was set for trial and judgment entered in favor of the plaintiff (*Trans., p.* 25), which judgment was affirmed by department 2 of the supreme court of the State of California and rehearing denied. (*Trans., p.* 27.) The opinion of the court will be found on pages 27-8 of the transcript.

The questions involved in the original case are the same as those involved in the railroad tax cases above cited, and the principal question involved upon the writ of error is precisely the same as was involved in the motion to remand the San Mateo case (reported in 7 Sawyer 517), and which was there denied by the court, Mr. Justice Field presiding.

These questions are clearly stated and fully discussed in that and the other cases cited, and also sufficiently appear from the abstract of the answer hereinbefore given.

The provisions of the constitution of the State of California bearing upon the case are as follows:

ARTICLE XIII.

"1. All property in the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. * * *

"4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and

other *quasi* public corporations, in case of debt so secured, the value of the property affected by such mortgage, deed of trust, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof. * * *

"A State Board of Equalization, consisting of one member from each congressional district in this State, shall be elected, &c. * * * The comptroller of the State shall be *ex officio* a member of the board. The Board of Supervisors of the several counties of the State shall constitute a board of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation. * * *

"10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

These provisions are held by the supreme court of the State to be self-executing.

S. F. & N. P. R. R. Co. vs. *State Board of Equalization*, 60 Cal., 12.

The statutory enactments to carry these provisions into

effect will be found in the Political Code (as amended in 1880, 1881), §§ 3627–8 and 3664. The first section re-enacts the provisions of § 4, Art. XIII, of the Constitution in substantially the same language. The second and third provide for certain details with reference to the assessment, which have no material bearing upon the questions involved.

In order that the nature of the special provisions for the taxation of railroad property may be appreciated, we refer briefly to the general provisions of the California Code governing the subject of taxation.

The ordinary assessment of property is made in each county by a county assessor elected by the popular vote, whose duties with reference to the manner of assessment are definitely prescribed. (*Pol. Code*, § 3607, *et seq.*)

The Board of Supervisors of each county constitutes a board of equalization, with power to equalize, or, in other words, to raise or lower, all assessments of property other than assessments on "railroads operated in more than one county." (*Pol. Code*, § 3672, *et seq.*) This power can be exercised only "after giving notice in such manner as it may by rule prescribe" (*Id.*, 3673); and no reduction can be made except upon the written complaint of the party assessed (*Id.*, 3674).

In order to give all parties, except the owners of railroads, an opportunity of making their complaints, it is provided by § 3654 that previous notice of the time the board "will meet to equalize assessments" shall be given by the clerk of the board by publication, &c.

Assignment of Error.

We assign as error on the record that the superior court

had no jurisdiction to proceed with the case after the filing of the petition and bond for removal to the circuit court, and the supreme court of the State therefore erred in affirming the judgment of the lower court.

It might also be assigned as error that on the merits, and independently of the question of jurisdiction, the judgment should have been for the defendant, as the invalidity of the constitutional provisions, under which the assessment was made, were matters of judicial cognizance.

Under the decision of this court in the *Railroad Company* vs. *Mississippi* (102 U. S., 135), however, it seems that the suits which may be removed to the circuit courts are coextensive with those of a civil nature in which a writ of error will lie to the highest State court under § 709, Revised Statutes; and, therefore, if we were entitled to a judgment on the merits we were also necessarily entitled to a removal. On this account, and also because the questions on the merits are involved in other cases before this court, where they will be fully discussed, we will confine ourselves to the point of error first assigned.

Points and Authorities.

I.

The questions involved in the case directly depend for their determination upon a construction of the Fourteenth Amendment to the Constitution of the United States, and therefore come within the jurisdiction of the United States circuit court.

Cohens vs. *Virginia*, 6 Wheat., 376.
Osborne vs. *Bank of U. S.*, 9 Wheat., 822.
Mayor vs. *Cooper*, 6 Wall, 251.

Murdock vs. *City of Memphis*, 20 Wall., 590.
Hoadly vs. *S. F.*, 94 U. S., 5.
Gold Washing & Water Co. vs. *Keyes*, 96 U. S., 201.
Tennessee vs. *Davis*, 100 U. S., 1058.
Railroad Co. vs. *Mississippi*, 102 U. S., 141.

As we construe these cases, the sole criterion by which the question of jurisdiction is to be determined is merely whether the questions involved depend for solution upon the construction of the Constitution or a law of the United States.

"In the language of Chief Justice Marshall, a case 'may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either' (*Cohens* vs. *Virginia*, 6 Wheat, 379); 'or when the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction.' (*Osborne* vs. *Bank of U. S.*, 9 *Id.*, 822.)"

Gold Washing & Water Co. vs. *Keyes*, cited *supra*.

"The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. None are excluded."

Mayor vs. *Cooper*, cited *supra*.

The other cases cited also state the rule in the same language or to the same effect.

It would seem therefore that no qualification can be annexed to the rule and that the merits of the questions involved are immaterial. If the court, in order to arrive at its decision, has either to affirm or overrule a construction of the Constitution, or of a Federal law invoked by one of

the parties, a question of Federal jurisdiction is presented, upon which the party has a right to have the decision of the Federal courts, and it therefore makes no difference, though the question should be a plain one and obviously adverse to the party invoking the Federal jurisdiction.

This appears to us the obvious meaning of the rule; and, if it is to be departed from, it seems difficult to suggest any definite and clear qualification to it.

It is unnecessary, however, for us in this case to insist upon this construction. We may safely admit, for the sake of the argument, that the question must be a real and substantial one, or that when it has been settled by the decisions of this court the right of removal will not exist. Here the questions involved not only turn upon the construction of Federal Constitution, and are real and substantial, but they are novel in their character, and so far as this court is concerned have never been adjudicated. They are also questions about which men may fairly differ, and upon which learned and distinguished jurists have, in fact, differed.

A mere statement of some of them will be sufficient to establish this position. The case involves the questions: 1st. Whether the provision of the California constitution which allows in the assessment of property generally the abatement of any mortgage upon it from its actual value, and at the same time denies this right to the owners of "railroads operated in more than one county," is not in contravention of the provision of the Fourteenth Amendment, which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." 2nd. Whether the provision of the State constitution providing for the assessment of such property without giving to the owners any opportunity to

apply to the board for an equalization or correction of their assessments, while at the same time it gives such opportunity to all other persons, is not a violation of the same provision of the Federal Constitution. 3rd. Whether the provisions of the State constitution which provides for the *final* assessment of such property without any notice to the owners or opportunity to be heard by the board or any other tribunal, while at the same time such notice and such opportunity is provided for in the case of the owner of all other property, is not also in contravention of the provision of the Fourteenth Amendment cited, and also of that provision which forbids any State to "deprive any person of life, liberty, or property, without due process of law;" and 4th. Whether the provisions of that amendment are confined to natural persons only or extend to corporations also.

These questions were sufficiently serious to require an extended consideration by the supreme court of the State of California in the *C. P. R. R. Co.* vs. *State Board of Equalization* (60 Cal., 35); and also of the circuit court in the *Railroad Tax Cases* (8 Sawyer, 238, and 9 Sawyer, 165); and the fact that the two courts arrived at opposite conclusions illustrates their serious character.

It seems idle, therefore, to contend, as was contended in the State courts, and will probably be contended here, that no "Federal question is really involved."

In addition we submit that the question as to the right of the State to tax the franchise of the defendant or its right to exist is also an open one.

This question was decided adversely to us by the supreme court of California in the case above cited, and also by the circuit court in the *Santa Clara Railroad Tax Case* (9 Sawyer,

173) upon the authority of *Thompson* vs. *Pacific Railroad* (9 Wall., 587).

With due deference to these decisions, however, we respectfully submit that under the later decision of the *Railroad Company* vs. *Peniston* (18 *Id.*, 5) the question is still an open one, and that that decision even indicates that a different view may be taken by this Court.

In the former case the defendant was a State corporation, and upon that ground, as we understand the case, it was held that its property was not exempt. In the latter case the defendant was a Federal corporation, but this fact was regarded by the Court as immaterial, and it was held, as in the former case, that its property was not exempt. The Court, however, seems to have based its decision upon the fact that it was the property and not the franchise that was made the subject of taxation, and it distinguishes the case from *McCulloch* vs. *The State of Maryland* and *Osborne* vs. *Bank of U. S.* on the ground that in those cases "the tax * * * was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created."

"It was," the Court says, "a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing both in its nature and effect from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the Court carefully limited the effect of the decision."

"It does not extend," said the Chief Justice, "to a tax paid by the real property of the bank in common with the other real property of the State, &c. * * *

"But this is a tax on the operations of the bank, and is consequently a tax on the operations of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the

property of a Government agent and a tax upon the operations of the agent acting for the Government. * * * It is therefore manifest that exemption of Federal agencies from State taxation is dependent not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of this power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

"In this case the taxes are laid upon the property of the railroad company precisely as was the tax complained of in *Thompson* vs. *Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being." (Pp. 34–37.)

II.

The case therefore comes directly within the decision in the *Railroad Company* vs. *Mississippi* (102 Wall., 141), in which it is decided that the terms "suits * * * arising under the Constitution or laws of the United States" (as used in the act) include not only cases where the cause of action is based upon the Constitution or laws of the United States, but also cases in which the the defense is based upon either.

San Mateo Co. vs. *S. P. R. R. Co.*, 7 Sawy'r, 238.

In the case last cited, which was a motion to remand a precisely similar suit for taxes against the plaintiff in error here, the same points were involved and were decided in our favor upon the authority of the former case; but the Court intimated that if it was at liberty it would not "hesitate to limit the authority to remove suits of a civil nature

to a Federal court under the act in question to those in which the cause of action arises upon the Constitution, laws, or treaties of the United States, and not extend to cases where the defense, as here, rests merely upon some right or privilege claimed under them" (p. 520), and the same view is intimated in the dissenting opinion in the *Railroad Company* vs. *Mississippi*.

In view of these intimations and of the fact that the point seems to have been the only one relied upon in the San Mateo case, it will not be improper for us to add a few words upon this topic.

It is an important fact to be observed that the language used in the act under consideration is precisely the same as that used in § 2, Art. III, of the Constitution of the United States, except that in the former the word "suits" is substituted for the word "cases" and that the suits referred to are confined to those of a civil nature.

It is claimed that the term "suits" is less extensive in its meaning than the term "cases," and that the use of this term in the act of 1875 indicates an intention to restrict the class of cases referred to.

We submit, however, that this distinction cannot be sustained. The terms "suit," "action," and "case," while each in their strict and proper sense presenting a different shade of meaning, are most commonly used as synonymous. The term "action" in its strict sense is the legal power of invoking the judicial force to coerce the defendant, or, as it is defined in the books, it is the legal power or right of pursuing in a judicial proceeding what is due to any one, (*"actio nihil aliud est quam jus persequendi in judicio quod sibi debetur."*)

A suit is the proceeding by which the plaintiff seeks to assert or prosecute an action. Both terms are, however, habitually, and perhaps most commonly, used to denote the whole proceeding. Thus we speak of filing a demurrer or an answer *in* a suit or action, though if we have regard to the strict propriety of terms, we should use the word "*to*" in place of "*in*." So we speak of a judgment *in* a suit or action, though it would be perhaps more proper to speak of the judgment as being *on* the suit or action. In the same way the term "case" is sometimes used to denote a question or state of facts presented; but it is most commonly used to denote a judicial proceeding, or, in other words, a suit or action. Accordingly it is so defined by Bouvier, Abbott, and Lawrence, and Rappalje, and probably by most other lexicographers; and it seems obvious that the term is used in this sense in § 2, Art. III, of the Constitution, for it is not the case made by the defense, but the whole case that is referred to. This is the view taken by Mr. Justice Story, who says:

> "In other words, *a case* is *a suit* in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union." (Story's Const., Sec. 1646.

Hence the cases which hold that the constitutional provision applies to all cases which involve the construction of the Constitution, laws, or treaties of the United States apply equally to the construction of the act of 1875.

Nor can any adverse conclusion be drawn from the fact that a different word is used in the act from that used in

the Constitution. The two words are so commonly used as synonymous that under any circumstances it should be presumed that they are so used by the legislature. This is required by the rule that in the construction of an act "words are to be read in their popular, natural, and ordinary sense * * * unless there is reason upon their face to believe that they were not intended to bear that construction." (Broom's Legal Maxim's, 549.) In this case it is apparent that the use of the term "suits" is merely accidental. The first part of the first section of the act of 1875 is a literal re-enactment of the corresponding part of § 629 of the Revised Statutes, and the only change made is by interpolating the clause "arising under the Constitution or laws of the United States," &c.

It also seems obvious from the provisions, as to other classes of suits, that the term was intended to be used in its largest and most familiar sense.

It will be observed, also, that the words used are "suits * * * arising *under* the Constitution or laws of the United States," &c. These words do not necessarily, or perhaps at all, imply that the suit must be *founded* upon the Constitution and laws of the United States; and, if such an idea had been intended, appropriate language would have been used, such as is in fact used with reference to another class of actions in the latter part of the first section. All that seems to be implied is that the suit must be such as to come under the Constitution and laws of the United States, or, in other words, be subject to determination by them. The term "arising" means nothing more than coming into existence, and we may paraphrase the language used without changing its meaning by saying that the action includes "all suits or

actions or cases *under* or subject to be determined by the Constitution and laws of the United States which may arise."

It will be observed, also, that the defense in this case is not an affirmative one, but is fully covered by the denial of the allegations of the complaint—all the matters specially pleaded being admissible under that defense. Even, therefore, if we construe the term "suit" as meaning only the plaintiff's cause of action, there will be no impropriety in saying of a suit that it arises under the laws by which it is to be determined, whether favorably or adversely, which in this case consist of the Constitution and laws of the United States, as well as those of California.

I respectfully submit that the judgment should be reversed.

GEORGE H. SMITH,
Attorney for Plaintiff in Error.

S. W. SANDERSON,
Of Counsel.

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Office Supreme Court U. S.
FILED.
DEC 11 1885.
JAMES H. McKENNEY.
CLERK.

No 841

IN THE

SUPREME COURT

OF THE

UNITED STATES.

The SOUTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

In Error to the Supreme Court of the State of California.

Brief of Defendant in Error.

~~SMITH, BROWN & HUTTON, and~~
~~S. M. WHITE,~~ R. M. Hitney
Attorneys for Defendant in Error.

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THE PEOPLE OF THE STATE OF CALIFORNIA.

In Error to the Supreme Court of the State of California.

Brief of Defendant in Error.

Statement of Case.

This action was commenced in the Superior Court of the County of Los Angeles, State of California, on the 10th day of March, 1882, to recover judgment against the plaintiff in error for the sum of $31,470.50, State and county taxes for the fiscal year 1880-81, with 5 per cent. added for the non-payment of such taxes, and fifty cents costs of collection to that date.

The complaint is in the form prescribed by the statute for such cases.

See Political Code of Cal., § 3900.

The answer was filed April 11th, 1882.

Tr. fols. 2-34.

In this State no replication to the answer is allowed, but all new matter in the answer is deemed denied.

C. C. P., § 422 and 462.

Afterwards, but on the same day, the plaintiff in error filed a petition and bond for the removal of the action to the Circuit Court of the United States.

From the entry on the minutes of the Superior Court, it appears the following proceedings at that time were had:

" Attorneys for the defendant move the Court to approve " the bond filed in this case as to the sufficiency of the sure- " ties, the amount and form."

" To which plaintiff's attorneys object, on the ground that " this case under the law cannot be transferred to the United " States Court, and such being the case the Court has no " jurisdiction to pass on the bond" * * * " Submitted and taken under advisement."

Tr. fol. 46.

This motion was denied and proceedings to remove the cause *were dismissed* by the Superior Court April 22, 1882.

Tr. fol. 57.

In the manuscript brief for plaintiff in error (no printed brief having yet been served) a diminution of the record is suggested, and an offer is made of a certified copy of an order made by the Superior Court April 24, 1882 (two days after the dismissal), in which the petition for removal is formally denied.

On account of an application to the Supreme Court of California for a writ of prohibition (hereafter referred to) nothing further was done in the case until July 9, 1883, when the plaintiff, after notice to the defendant, moved the Superior Court " to set the case for trial, and thereupon the defend- " ant objected to the said motion on the ground that this " Court (Superior) had no jurisdiction of the case since the " filing of the petition and bond for the transfer of the case " to the Circuit Court of the United States, and at the same " time moved the Court to proceed no further in the case."

Tr. fol. 34.

The petition and bond for removal, and the pleadings in the case, were read to the Court by defendant in support of their said objection and motion.

Tr. fol. 34.

It was admitted by the plaintiff that a copy of the record, petition and bond, duly certified, was entered in the U. S. Circuit Court prior to the first day of its session next after April 11, 1882.

Tr. fol. 35.

The plaintiff then read in opposition to the defendant's motion the opinion and order of the Superior Court dated April 22, 1882: "Thereupon the Court overruled the motion of "the defendant and its objection to the motion of the plaint-"iff, and the defendant then and there excepted to each "ruling."

Tr. fol. 35.

If there be any bill of exceptions in the case, these facts appear from such filed July 9, 1883.

Copies of the petition and bond of the plaintiff in error for removal of the case, and also the opinion and order of the Court refusing to approve the bond and dismissing the proceedings for removal, are annexed as Exhibits A, B and C, respectively, to the pretended bill of exceptions and made parts of it.

On September 18, 1883, the case was set for trial on September 24, 1883, and was tried on that day, the plaintiff in error failing to appear.

On October 29, 1883, judgment was given in favor of the plaintiff in the action, according to the prayer of the complaint and for attorney's fees.

Tr. fols. 57–60.

On November 6, 1883, the defendant in the action appealed to the Supreme Court of California from the judgment on the judgment roll.

Tr. fols. 60–61.

That Court on the 28th day of August, 1884, affirmed the judgment of the Court below (Tr. fols. 65–67), and from that judgment a writ of error to this Court has been taken. As stated by the counsel for the plaintiff in error in his brief, there are pending in the courts, principally, we believe, in the U. S. C. C., Ninth Circuit, many cases instituted by the people of this State against the plaintiff in error and the Central Pacific R. R. Co. for taxes.

This case in several particulars, it is claimed, involves the same questions, but in some respects is different from those

cases. Counsel in his statement of the case is in error when he says that the answer filed in the State Court states or shows that at the time the taxes in question were assessed there were any mortgages existing on any of the property assessed. The answer (Tr. fol. 30) shows the assessment was made on the 2d day of May, 1880, and shows (Tr. fol. 11) the existence of such mortgages *prior to January 1, 1881*, but *not on the 2d day of May, 1880*. The same may be said of the petition for removal.

Tr. fol. 39.

Points and Authorities.

I.

The record does not show any proper bill of exceptions. It was presented and settled too late.

The Superior Court had on the 22d day of April, 1882, refused to approve the bond and had ordered the proceedings for the removal of the case to the U. S. Circuit Court to be dismissed; and if the offer of plaintiff in error to correct the record be allowed, the record will then show that the Superior Court had on the 28th day of April, 1882, denied the petition for removal.

To this action of the Court the bill shows no exception. This was the time when the plaintiff in error should have taken its bill of exceptions.

It was therefore too late, over fourteen months after the Court had dismissed or denied its proceedings to remove the cause, to complain of that ruling or order, or of errors in any other ruling, when in order to show error it is compelled to avail itself of the petition and bond as *the basis* for showing such error.

C. C. P. §§ 644–650—especially § 649.

See also same Code, § 1054.

The minutes of the Court (Tr. fol. 46) do not show that the defendant in the action, at the time or on the day its answer wes filed, made any motion for any transfer or removal of the cause to the U. S. Circuit Court, but only that it moved the Court to approve the bond. This seems to be the view taken of it by the Judge of the Superior Court.

Tr. fol. 57.

II.

Again, the bill of exceptions only shows that the Court on the 9th day of July, 1883, overruled the motion of the defendant, which was that the Court proceed no further in the case, and overruled the objection of the defendant to the plaintiff's motion to set the case for trial, and shows exceptions by defendant to each of *these* rulings.

Tr. fols. 34 and 35.

The bill of exceptions does not show that the Court *then or afterwards* set the case for trial or did anything further.

The record (the judgment, Tr. fols. 57–60), however, shows that over two months thereafter, both parties being present in open Court by their respective counsel, the Court without objection by defendant in the action set the case for trial on the 24th day of September, 1883, and that on the day of trial counsel for plaintiff in error failing to appear, the Court had them called before it and notified that the trial was about to begin, but that they declined to attend further at the trial and withdrew.

We submit that the bill of exceptions shows no error on the part of the Court.

III.

The proceedings for the removal can only be made a part of the judgment roll by bill of exceptions.

A bill of exceptions must show error and all omissions, and uncertainties in it are to be construed against the party presenting it.

Code of Civil Procedure, §§670 and 644–650.

People vs. Winters, 29 Cal., 658.

People vs. Williams, 45 Cal., 25.

It necessarily follows if there be no bill of exceptions in this case, or if the bill shows no error, the judgment will be affirmed.

IV.

Assuming that the bill of exceptions is correct and that all the acts of the State Courts are before this Court for review, no error is shown.

It is claimed by the plaintiff in error that this action should have been removed to the U. S. C. C., because:

1st—The defendant in this action was and is a corporation, chartered by Congress, an instrument or agency of the Federal Government, and therefore exempt from taxation by the State upon its franchise, etc.

2nd—The provisions of the Constitution and laws of California providing for the taxation of its property discriminate against the R. R. Co., and are therefore in conflict with the 14th Amendment to the Constitution of the U. S., which guarantees to it the equal protection of the law.

3rd—That the State Constitution and laws provide for the assessment and taxation of its property without notice or an opportunity to be heard, and for that reason are violative of that Amendment; that the action is a suit of a civil nature, and is a case arising under the Constitution and laws of the United States, therefore removable under the Act of Congress of 1875.

V.

When a defendant seeks to remove a cause pending in a State Court to the Circuit Court of the United States, and presents his petition and bond therefor, the State Court has the power (and we may say it is its duty) to look into the papers or proceedings, and for itself determine the questions not only as to the sufficiency in form of the papers, but also whether the bond is otherwise sufficient, and whether the petition really shows the case to be removable. And if as in this action the case is claimed to be one "arising under the "Constitution or laws of the United States," the State Court must *for itself* determine whether the case *is* such as it is claimed to be, or in other words whether a "Federal question" does arise.

The Supreme Court of Texas, in the case of the T. and P. R. R. Co. vs. McAlister, decided in May, 1883, affirmed the judgment of a State Court in an action which had been tried in it after the filing of a petition and bond for removal to the Federal Court, and held that the State Court had the power to inquire into the sufficiency of the petition and if insufficient it was *not error* to disregard it.

In *ex parte* Grimball, 61 Ala,, 598, the Supreme Court of Alabama likewise held that the State Court should look into the proceedings for the removal, and the Supreme Court

refused to issue a writ of prohibition to the State Court wherein the action sought to be removed was pending because it did not appear that the case was one which could *properly* be removed to the Federal Court.

This case was affirmed in *ex parte* Jones, 66 Ala., 205.

In Bell vs. Dixon (See 49 N. Y., 232) the action of the State Court in which the suit was pending when the petition and bond for removal were filed, denying a motion for a stay of proceedings was approved by both the Supreme Court and the Court of Appeals of the State of New York.

In the "Removal Cases" (100 U. S., p. 457), the Supreme Court said: "We fully recognize the principle heretofore as-"serted in many cases that the State Court is not required to "let go its jurisdiction until a case is made, which upon its "face shows that the petitioner can remove the case *as a* "*matter of right.*"

As before intimated, the plaintiff in error before the trial in the Superior Court, applied to the Supreme Court of California for a writ of prohibition against the lower Court, but the writ was denied by the Court in Bank.

Sec. 63 Cal., 607.

On this point see Field's Fed. Courts, §178, also the cases cited by Mr. Desty, in "Removal from State to Federal Courts, pp. 155, 156 and 157. See 5 Fed. Rep. 23, in which Judge McCreary said on a motion to remand that the Court was not bound by the allegation that the case involved a Federal question, and remanded the case notwithstanding such allegation.

VI.

It being then the right and duty of the State Court to examine or look into the petition, what effect does the mere filing and presentation of it and the bond, without any order from the State Court, have?

So far as the present case is concerned we might concede that IN A PROPER CASE on the presentation and filing in the State Court of a *sufficient* petition and bond the jurisdiction over the cause is *eo instanti* as *by operation of law* removed or transferred from the State to the Federal Court.

See Spear's Law of the Federal Judiciary, pages 516 *et seq*, and cases cited.

This may be the true construction of or deduction from the provisions of the Constitution of the United States and the provisions of the Revised Statutes.

VII.

But we think it equally true in principle, although it may not be so generally conceded by all the Courts, that the mere presentation and filing of a bond and petition in which the defendant fails to *show* a case *really* and *in fact* arising under the Constitution or laws of the United States *cannot have any effect* upon the jurisdiction of the State Court.

It neither ousts its jurisdiction nor suspends nor stays it.

If the case be not remobable to the Circuit Court the jurisdiction of the State Court over it is not in anywise affected by the proceedings.

See on this point Desty's Removal from the State to Fed. Courts, p. 156, and cases cited under paragraphs 5, 6, 9, 10, 22, 14 and 15.

Spear's Law Fed. Judiciary, p. 518.

Prohibition Case, 63 Cal., 607.

VIII.

"The judicial power of the United States shall be vested in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish."

U. S. Const., Art. 3, § 1.

The same Constitution further provides that "the judicial "power shall extend (among other things) to all cases in law "and equity arising under this Constitution, the laws of the "United States, and treaties made or which shall be made "under their authority" * * * "to controversies" * * * "between a State and citizens of another "State."

The judicial power is therefore limited. The Constitution defines the limits, whilst Congress prescribes how much of that power so granted to the United States is to be exercised by the Federal Courts.

3 Dallas, 10.

7 Cranch, 506.

12 Peters, 616.

3 How., 245.

IX.

Such is the relation which the Government of the United States and of a State respectively bear to each other that Congress cannot confer jurisdiction on a State Court, nor can the Legislature of a State confer jurisdiction on a Federal Court.

25 Cal. 604.
Huber vs. Riley, 58 Pa. State, 112.

In those cases to which the judicial power of the United States extends and is exclusive, *e. g.*, admiralty cases, a State Court can exercise no jurisdiction; and in other cases where it is not exclusive, Congress may, perhaps, by express enactment, vest the jurisdiction exclusively in the Federal Courts; *but it cannot take away any of the jurisdiction of a State Court nor stay or affect it*, except in those cases where it may rightfully, *constitutionally*, give the *same jurisdiction* to a Federal Court, for it is *only* in such cases that it can *constitutionally* legislate.

See authorities *supra*, under this, and Points V., VI., VII. and VIII.

X.

So we say if the cause sought to be removed to the Federal Court be not one which can be *properly* removed, the attempt to do so is a *nullity*, and the power of the State Court to hear and determine it is *wholly* unaffected.

The provision of the Revised Statute that the State Court shall accept the petition and bond and proceed no further in the case must be construed to refer to only those cases *properly removable* and when the petition and bond are sufficient in both form and substance.

If Congress has attempted to go beyond this and to enable any defendant to either remove, stay or suspend the prosecution of a suit against him in a State Court by falsely or simply alleging in his petition that for his defense he relies upon some provision (it may be as in this case the 14th Amendment) of the Constitution of the United States, it has gone beyond any power conferred upon it.

Spear on Fed. Judiciary, p. 117, 457, 489.

XI.

The petition in this case does not show that any Federal question really arises. It is true that the defendant alleges that the construction of the 14th Amendment to the United States Constitution is involved, and also that the R. R. Co. has been adopted or constituted, as it were a branch or agency of the Government of the United States and as such is exempt from taxation on its franchise and operations.

But if an examination and *consideration* of its answer and petition show that its claim of being a Govermental Agency is without foundation and cannot be supported and that the 14th *Amendment has no application to its case*, the proceedings for removal would no more oust the jurisdiction of the State Court in this action than would the jurisdiction of the State Court be interfered with in any ordinary suit upon a promissory note for over $500.00, wherein the defendant might *allege* that he bases his defense upon that or some other provision of the Constitution, law of Congress or treaty of the United States with China or other foreign Government.

See 6 Peters, 41.

5 Fed. Rep., 23 and authorities, Supra.

The defendant's saying that a Federal question is involved does not make it so. As we have shown the Court must look into the question and decide for itself.

When its jurisdiction is challenged every Court must in the first instance for itself decide such question. If the case be one which is removable and the proceedings correct, the State Court should grant the removal or in other and *perhaps* more appropriate words the State Court should recognize the removal and proceed no further in the case.

A consideration and comparison of the several provisions of the statute relating to the removal of causes from the State to the Circuit Courts, with those provisions providing for a writ of error from the highest Court of a State to this Court will, we think, materially strengthen the position which we have attempted to maintain.

See Desty's Fed. Procedure, § 639a, p. 184 *et seq*, as to removal, and Id., § 709, p. 331 *et seq*, as to writ of error.

As to the former it will be seen the statute speaks of a suit of a civil nature at law or in equity * * * arising under the Constitution or laws of the United States * * *

In the latter case it is provided that any final judgment or decree in any suit in the highest Court of a State * * * where *is drawn in question* the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity * * * or when any title, right, privilege or immunity is claimed under the Constitution or any treaty of * * * the United States and the decision is against the title, right, privilege or immunity specially *set up or claimed* by either party * * * may be re-examined and reversed, or affirmed on a writ of error.

Thus it would appear that in granting the right to a writ of error to this Court to review such judgment the statute is more liberal than the provision giving the right to remove a suit to the Circuit Court; and yet this Court in Millingar vs. Hartupee, 6 Wall. 259, held that under the 25th Section of the Judiciary Act of 1789, which was so far as material, the same as the Acts of 1867 and 1875, where a party *claims* authority under an order of Court of the United States, which when rightly viewed does not purport to confer any authority upon him, the writ will be dismissed for want of jurisdiction. The Court says: "Something more than a bare *assertion* of such an authority seems essential to the jurisdiction of this Court. The authority intended by the act is one having a *real* existence. * * "

See also Gill vs. Oliver's, Exr's., 11 How. 546.
Williams vs. Oliver, 12 How. 119.
Spear on Law of Fed. Jud. p. 584 *et seq.*

But in this action the State Courts have, as was said by this Court in the removal cases (100 U. S. R.) they might do, refused to let go of its jurisdiction and have proceeded to judgment. The Circuit Court of the United States, we presume, has *assumed* to assert jurisdiction of the action; but if the case was *in fact* not removable *it was not removed; the State Court lost no jurisdiction and the Circuit Court acquired none.*

It is therefore simply a question between the State Courts and the C. C. of the U. S. as to which had or has jurisdic-

tion. One Court had or has *the power to hear and determine, the other not.*

The action of the one, therefore, *is valid;* that of the other, *void.*

See the authorities, cited *supra;* also 16 Peters, 97; 19 Wallace, 214; 14 How., 13; 15 How., 198; 100 U. S., 492; 41 N. Y., 149; 46 N. Y., 1; 2 Met., 240; 7 Neb., 146.

Prohibition Case, 63 Cal., 607.

Texas and P. R. R. Co. vs. McAllister; Supreme Court of Texas, May, 1883.

It logically follows that so far as concerns the jurisdiction of the State Court there is no necessity for an order of the Circuit Court remanding the case.

In Cooley's Constitutional Limitations (5th ed) top p. 359, speaking of the 14th Amendment to the U. S. Constitution it is said: "This provision" (the first clause) "very properly puts an end to any question of the title of the freedmen and others of their race to the rights of citizenship, but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State Constitutions; though as a principle of State Constitutional Law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State Courts upon laws, which are supposed to violate it, will be subject to review in that Court on appeal"

XII.

Again, and as held or suggested by the Supreme Court of California in its decision of this case (see Tr. fol. 66), since the removal of the cause, if authorized by the Constitution and laws of the United States, involved the trial of every question which may arise in it, whether questions of State or Federal Law, and no provision is made for remanding the case to the State Court to try the State questions if the Federal Court should decide that the Federal questions are not maintainable, it may well be doubted that an action by

the people of a sovereign State to recover taxes claimed by it from one of its tax-payers can be removed from the State Court to the Circuit Court of the United States.

XIII.

The case of the R. R. Co. vs. Mississippi (102 U. S. p. 136), so confidently relied upon by the plaintiff in error, is not in conflict with our position.

An examination of the case will show that the R. R. Co. not only *pretended* to have or *alleged* a claim arising under the laws of the United States, but *really and in fact had and sustained* the claim.

This Court in its opinion (pages 139 and 140) says: "While the case raises questions which may involve the construction of State enactments and also perhaps general principles of law not necessarily connected with any Federal question *the suit otherwise presents a real and substantial dispute or controversy which depends altogether upon the construction and effect of an act of Congress.*"

That is not the case here. *No real or substantial controversy* has arisen or can arise.

It appears to us that no Court can examine the answer and petition in this case and decide for itself the question as to the right of the defendant to have this case removed to the Federal Court and fail to come to the conclusion that no *real* Federal question is *in fact* shown to exist, or to the opinion that the defendant's *claim is without merit.*

XIV.

The plaintiff in error attempts in its brief to show that a real controversy under the Constitution and laws of the United States did in fact arise, because the Supreme Court of this State and the Circuit Court of the United States have decided certain questions contrary to each other.

Decisions of Courts *do not make* the law, nor do they *make* controversies of that kind. *If they do*, those decisions did not make *any real controversy* in this action at or before the date of the proceedings for its removal; for the very earliest decision by the Circuit Court in any of the tax cases (See 7 Sawyer, 517) was made July 31, 1882, some months after

the commencement of this action, and after the State Court had refused to recognize its removal.

The Courts merely *declare* the law; they may and frequently do differ, *but their differences do not affect the correctness of the true principles of the law.*

It cannot, therefore, with any greater force be said that a *real and substantial* controversy arose in this case which entitled the R. R. Co. to remove this action to the U. S. C. C., because on the two questions as to the deductions of the mortgages and the want of notice to the Co. before the assessment became final, the Supreme Court of the State, in the 60th Cal., decided one way, and the U. S. C. C., in the R. R. Tax Cases reported in the 7th, 8th and 9th Sawyer, decided the opposite way, than it could be contended that the claim of the R. R. Co. that it, as an agency of the Federal Government, was exempt from State taxation upon its franchise and operations, on which question the two Courts agreed entitled it to such removal.

XV.

The answer and petition for removal do not show that the R. R. Co., as an agency or instrument of the Federal Government, is exempt from State taxation on its franchise or operations.

As said by the learned Judge of the Superior Court before whom the proceedings for the removal were had:

"It does not appear that the defendant was incorporated by an Act of Congress. The various Acts of Congress claimed as incorporating the Railway are made a part of the petition and contradict its statements as to the incorporation.

By Section 18 of the Act of Congress approved April 27, 1866, it is provided:

'That the Southern Pacific Railroad, *a company incorporated under the laws of the State of California,* is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this Act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof to aid in its construction, should have similar grants of land, subject to all conditions and limita-

tions herein provided, and required to construct its road on the like regulations as to time and manner with the Atlantic & Pacific herein provided for.'"

"In the Act of Congress incorporating the Union Pacific, July 1, 1862, in the ninth Section of said Act it is provided:

'That the Central Pacific Railroad Co., of California, *a corporation existing under the laws of the State of California,* are hereby authorized to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the Eastern boundary of California, upon the same terms and conditions in all respects as are contained in this Act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the Eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this Act in the Department of the Interior within six months after the passage of this Act.'"

"The third section grants certain sections of land to the companies to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, etc. The fifth section provides for the issue of bonds to the companies, or a subsidy for the same purpose.

As the answer and the petition refer to the Acts of Congress granting subsidies to the defendant, and make them a part of the application, the Court must regard them in that light. The Acts of Congress refer to the Southern Pacific Railroad as an existing corporation under the laws of California at the time of the grant to the railroad, it must be held that it was a regularly organized corporation of the State at that time. It was not, therefore, *a corporation created by the Act of Congress, and was not, in consequence, an instrument of the Federal Government, created by Congress for the execution of the purposes of the National Government.* To hold that the State government could create such an instrument would be to decide that the State government had power to add at pleasure to the powers of the National Government. This question was presented and decided in the case of Thompson vs. Pacific Railroad, to restrain the collection of taxes imposed on a railway organized by the Legislature of Kansas. The

Court held that the railroad, as a State corporation, was liable to State taxation. The opinion was rendered by Chief Justice Chase, 9th Wallace, 586. The Court distinctly decided that 'Although, confessedly, Congress may constitutionally make or authorize contracts with individuals or corporations for service to the government, may grant aid by money or land in preparation for and in the performance of such service; may make any stipulations and conditions in relation to such aids not contrary to the Constitution, and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them, yet in the absence of all legislation on the part of Congress to indicate that such an exemption is deemed by it essential to the full performanee of the party's obligation to the government, the exemption cannot be applied to the case of a corporation deriving its existence from State law, and holding its property within State jurisdiction and under State protection, only because of the employment of the corporation in the service of the government.'"

"Upon the justice of the claim of exemption from taxation by the State, Judge Chase remarks:

'The nature of the claim to exemption which is advanced in behalf of the complainants in the case before us—the very ground of the claim is the bounties of the general government. The allegation is, that the government has advanced large sums to aid in the construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income.'"

"Such are almost identically the allegations in the petition and answer of the case at bar.

"In the case of the National Bank vs. Commonwealth claiming exemption from taxation, 7 Wallace, 352, the same Court held:

'The doctrine which exempts the instrumentalities of the Federal Government from the influence of State legislation, is not founded on any express provision of the Constitution,

but in the implied necessity for the use of such instruments by the Federal Government. A State law requiring the national banks to pay the tax which is rightfully laid on the shares of its stock is valid under this limitation of the doctrine.'"

"The case of the Railroad Company vs. Peniston, 18 Wallace, 7, presented the case of a corporation chartered by Congress by Act of July, 1862. The grants to the company by Congress were upon condition that the company shall, first, pay the bonds of the United States at maturity; second, keep their line and road in repair and use; third, transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores, upon said railroad for the government, and giving the government the preference, at fair and reasonable rates of compensation, not exceeding those charged to private individuals; the amount thus earned to be applied in payment of the bonds, as well as 5 per cent. of the net earnings of the road after its completion. The Court held as there was no Act of Congress expressly exempting the road, its property was liable to State taxation."

"Mr. Justice Strong delivered an exhaustive opinion on the case, and speaking of the case of Thompson vs. the Union Pacific Railway Company, said:

'There is no difference that can be pointed out between the nature, intent or purposes of their agency and those of the corporation complaints in the present case. Yet, as we have said, a State tax upon the property, its road bed, rolling stock and personality in general, was ruled by this Court not in conflict with the federal constitution. It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent, merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the State in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of the property within the State is employed in the execution of the business of the government. It belongs to governmental agents, and it is not only used, but necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad.

Telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards and multitudes of manufacturing establishments. They are the property of natural persons or corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States, it is manifest the State governments would be paralyzed."

"For the purpose of the decision, it is therefore immaterial whether the defendant was incorporated by the State or by an act of Congress."

In the Delaware R. R. tax case this Court held that the exercise of power which every State possesses to tax its corporations and all their property, real and personal, and *their franchises,* and to graduate the tax upon the corporations, according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports or tonnage or transportation to other States, cannot be regarded as conflicting with any Constitutional power of Congress.

The Delaware R. R. Tax, 18 Wallace, 208.

In the same case it was held that the State may impose taxes upon the corporation as an entity existing under its laws as well as upon the capital stock of the corporation or its separate corporate property. *And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious,* are mere matters of legislative discretion.

See also Lane County vs. Oregon, 7 Wallace, 71.

Nathan vs. Louisiana, 8 How., 73.

Hamilton County vs. Massachusetts, 6 Wallace, 632.

See the case of Osborn vs. Bank of U. S., 9 Wheaton, 859, where the distinction is clearly drawn by Chief Justice Marshall between the two cases as to when the State *may* tax and when it *cannot* tax the corporation or person.

In speaking of this distinction it is said: "This mere "private corporation engaged in its own business with its "own views *would certainly be subject to the taxing power of* "*the State* as any individual would be; and the casual cir-

" cumstance of it being employed by the government * *
" would no more exempt its private business from the opera-
" tion of that power than it would exempt the private bus-
" iness of any individual employed in the same manner." *
" * * * * * * * * * *

" It (the Bank) is not an instrument which the govern-
" ment found ready made and has supposed to be adapted to
" its purposes, but one which was created in the form in
" which it now appears for National purposes only."

See also S. F. and N. P. R. R. Co. vs. State Board of Equalization, 60 Cal., 12.

C. P. R. R. Co. vs. State Board of Equalization, 60 Cal., 35.

S. V. Water Co. vs. Schottler, 62 Cal., 71.

C. P. R. R. Co. vs. Superior Court, 62 Cal., 618.

XVI.

There must be some express provision by Congress exempting the Company from such State taxation, or the State may tax the franchise and all other *property* of the corporation. Such tax must *directly* and *not remotely* prevent or interfere with the performance by the agent of the duties which he or it may owe to the government, or else the tax may be imposed by the State.

Thompson vs. P. R. R., 9 Mallard, 90.

National B. R. vs. Commonwealth, Id., 353.

114 U. S., 525 and 623.

Cooley on Tax (Ed. 1876), p. 273.

See also the opinion of Mr. Justice Field, in the San Mateo tax case, 8 Saw., 248, et seq., and in the Santa Clara tax case, 9 Saw., 173, et seq.

In the last case (9 Saw.) it is there shown that the true doctrine is laid down in Thompson vs. Pacific R. R. Co., 9 Wall, 579.

It is difficult to perceive how a tax on the franchise of a R. R. Co. would more directly interfere with the performance by such company of its duties and obligations to the Federal Government than would a tax upon all of its roadways, depots, rolling stock and other property.

And even if it were sold, would not either the sale be void without the consent of the Sovereign power which granted

the franchise, or the purchaser succeed only to the interest of the R. R. Co. in the franchise, and take it with all the conditions imposed by the government.

94 U. S., 156.

XVII.

It is also claimed that the Constitution of the State violates the provisions of the 14th Amendment to the Constitution of the United States, because under the laws of California, except in favor of railroads and other *quasi* public corporations, a mortgage upon real estate for the purposes of taxation is deemed an interest in the land, and in assessing the real estate the mortgage is deducted from the valuation of the land; whereas no such deduction is permitted in favor of railroads and other *quasi* public corporations.

We think it unnecessary to go at length into a discussion of this question, because:

1st. As before intimated in the statement of the case, the plaintiff in error has not shown that there was any mortgage upon its property when the assessment was made.

2nd. The whole question on its merits has been argued before the Court in one or more of these tax cases by some of the most eminent counsel of the bar of this Court.

1st. Courts do not decide mere abstract questions of law which do not affect the rights of the parties before it, and therefore it matters not, *so far as this case is concerned*, whether the Constitution and laws of California be in conflict with the Fourteenth amendment or not.

Stanley vs. Supervisors, 105 U. S., 305.

Evansville Bank vs. Britton, Id.

The plaintiff in error fails *even to allege* such facts as to show any discrimination in the tax assessment against it.

The taxes were assessed May 2, 1880. No mortgage is shown to exist at that time or at any other, except it is stated that there were mortgages on its property prior to January 1, 1881.

See Tr. fols. 11, 30 and 39.

Would a State Court be bound to let go its jurisdiction and proceed no further in a case on such allegations?

Clearly, not.

See Millingar vs. Hartupee, 6 Wall., 259.

And if not, why not in such a case as well as in any other case where the Court can see that no real, substantial Federal question or controversy exists?

It may be in the nature of a fiction of the law (and sometimes *perhaps* is), but a Court is presumed at all times to know the law of which it is required to take judicial notice; and can with as much ease and certainty draw a correct conclusion of law as to the existence of a real and substantial Federal question on facts well pleaded as where they are defectively pleaded.

2nd. The constitution of the State however is not in conflict with the provisions of the 14th Amendment to the Federal Constitution in regard to the assessment of the property of the R. R. Co.

a. Assessment by a State Board of Equalization of the roadway, franchise, etc., as a unit and the apportionment by the Board of such valuation among the several counties according to the number of miles in such county is proper. The constitution requires *all* property to be assessed at its actual value. Whatever the mode or instrument adopted for the assessment the same result is attained or at least required.

92 U. S. 575.
U. P. R. R. vs. Cheyenne 113 U. S. 522.
8 Saw. 309 and 310.
State Constitution, art. XIII., §§1 and 10.

b. The 14th Amendment was adopted to secure to the freedmen and others of that race all their rights as citizens of the United States.

This Court in the Slaughter House Case, 16 Wall 36, said: "We doubt very much whether any action of a State not directed by way of discrimination against negroes as a class or against their race will ever be held to come within the purview of its provisions."

See also Cooley on Constitutional Limitations (5th edition), top p. 14 N. 1, and 359.

He expresses the same idea, and further says: "It may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State Constitutions."

c. The clause, "Nor shall any State deny to any person

within its jurisdiction the equal protection of the law," does not include corporations, but only refers to natural persons.

C. P. R. R. N. State Bd. of Equal., 60 Cal.

Insurance Co. vs. New Orleans, 1 Wood, 85.

The rule of interpretation, *Noscitur a Sociis,"* is a sound one.

d. It is held by Mr. Justice Field in the Santa Clara tax case (9 Sawyer, 193,) that the word "person" in this clause of the 14th Amendment must include corporations, and he says: "So, therefore, whenever a provision of the Constitution or of a law guarantees to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations, not to the name under which different persons are united, but to the individuals composing the union. The Courts will always look through the name to see and protect those whom the name represents."

There is much force in the position and reasoning so far as the cases or circumstances referred to and discussed by him are concerned. It may well be that when the Constitution of the United States extends the judicial power of the United States to controversies between citizens of a State and aliens and between citizens of different States, this should be held to include corporations.

On the same principle and for the same reasons it was correctly held in 8 Wheat., 464, that a corporation was protected from the Confiscation Act of the State of Vermont by the terms of the treaty between the United States and Great Britain, which prohibited any future confiscation of the property of, or any prosecution against any person for or on account of the part which he had taken in the war, and which protected every person from loss or damages in person, liberty and property.

But it seems to us that the reasoning loses much, if not all of its force, when applied to the Fourteenth amendment to show that it is a limitation on the power of a State to tax corporations.

We suppose it will hardly be questioned that this State could, before the adoption of the Fourteenth amendment, have taxed the property of non-resident aliens situate in

this State in a manner or upon a basis different from the manner or basis adopted for the taxation of its own citizens.

Constitutions and laws of a Nation or State are made for the protection of its citizens and persons resident therein and not for such aliens, unless expressly included. Yet aliens, whether residents or not, are permitted to purchase, hold and own stock in corporations formed under the laws of this State. If the provisions of the 14th Amendment are to be held as including corporations, and that they are thereby protected from all discriminations in the matter of taxation and are entitled to notice of the assessment, a hearing, etc., as contended by the plaintiff in error, because their stockholders *as individuals* are protected by its provisions, would not such a construction in effect extend the provisions of the Amendment so as to protect non-resident alien stockholders?

How could a part of the stockholders be protected through the corporation and the same protection be denied to any non-resident alien stockholder?

And would not this be extending the protection of the laws of this State to persons not within the jurisdiction of this State—a consequence hardly contemplated by the framers, or the State, in the adoption of the 14th Amendment, where the words "within its jurisdiction" are used.

As to the justice of granting protection to a corporation because it is a mere association of individuals, we can see no greater hardship in holding stockholders, bound by the principles of law appliable to corporations, than in applying to members of a co-partnership those principles which govern such an association.

The relations are in such case voluntarily assumed, and in neither is a continuance compulsory.

e. Judge Cooley in his work on Taxation, (Ed. 1876) p. 392 and 393, speaking of taxes on corporations, says:

"These are imposed in so many forms that an enumeration is difficult. The following may be mentioned: 1. A specific tax on the franchise. 2. A tax on the property by valuation. 3. A tax on the capital stock. 4. A tax on the business done. 5. A tax on dividends or on profits."

The clause which guarantees to every person within the jurisdiction of a State the equal protection of its laws was certainly never intended by the States to prevent taxation

of corporations in either of these modes, though different from the mode prescribed for the taxation of natural persons.

f. As to the right to deduct mortgages from the valuation of the land the Constitution of California puts *railroads and all quasi public corporations* on the same level.

Constitution, Art. XIII., § 4.

Such classification is not inhibited by the amendment.

See authorities under "a," this Point, *supra;* also Missouri vs. Lewis, 101 U. S., p. 29.

g. Absolute equality of taxation is utterly impossible under any revenue system yet devised.

Cooley on Tax (ed. 1876), p. 124.

XVII.

It is also contended that the assessment and enforced collection of taxes against the R. R. Co., under the revenue lrws, legislative and constitutional, of California would be to deprive the company of its property without due process of law, and in violation of the 14th Amendment.

To this we say:

1st. Due process of law, if applicable to the assessment and collection of taxes or revenue for Governmental purposes, is not equivalent to, nor does it mean, the due and orderly course of proceeding according to the common law, where a party must have a notice and opportunity to be heard.

Murray's Lessee vs. The Hoboken Land and Improvement Co., 18 How. (U. S.)

2nd. As to the necessity for such notice and opportunity to be heard a distinction is drawn between cases of *assessments* for local improvements and taxes for general revenue, and the cases cited by Judge Cooley in his work on Taxation, page 266, are cases involving such *assessments.*

3d. Proceedings to raise public revenue in this State are not judicial in that sense, which in order to constitute due process of law, implies or requires a notice or hearing essential to the validity of judicial proceedings; but all such tax proceedings are and must necessarily be summary in their nature.

State R. R. Tax Cases, 92 U. S., 575.

Davidson vs. New Orleans, 96 U. S., 97.

McMillen vs. Anderson, 95 U. S., 37.

4th. The Constitution of the State (Art. XIII., § 10) gives the State Board of Equalization the power to assess the franchise, roadway, rolling stock, etc. of the plaintiff in error, and to apportion the assessment among the several counties in which the road is situated, in proportion to the number of miles of railway in such counties.

Section 3664 of the Political Code of the State as in force in the year 1880, the date of the assessment of the taxes in question, *required* the R. R. Co through its President or other agent to furnish the Board on or before the first Monday in April of that year a statement signed and sworn to, showing in detail the number of miles of road, value per mile, number and value of cars, engines, and in short a detailed statement of its property and business for the year preceeding the first Monday in March; the section further required the Board on or before the first Monday in May of that year to make the assessment of the franchise roadway, road-bed, rails and rolling stock.

Section 3692 of the Political Code required that the State Board of Equalization should hold regular meetings at the State Capitol on the second Monday in each month.

a. Thus it appears that by the Statute, of which the company was compelled to take notice, they were notified and *required* to come before the Board and have a full hearing as to its property and valuation.

If a hearing had been desired the company could have had it on the second Monday in April of that year, if not before or after that date, and prior to the making of the assessment on the first Monday in May.

See State R. R. tax cases, 92 U. S., 575.

It does not appear from the record whether the company furnished the statement to the Board or not as required by law. It either did, or did not. If it did, that was in fact *a hearing*, and the company was then before the Board and subject to its jurisdiction, and bound to follow the assessment of its property through all the steps and proceedings to the end in the same way that the defendant in an action or proceeding is required to do after he has once appeared therein.

If the company did not furnish the statement required it was not entitled to a notice or hearing.

The same section (§ 3664 Political Code) as in force in 1880 (see statutes of 1880, p. 44) provides "If such officers fail to make such statement said Board of Equalization shall proceed to assess the property of the corporations so failing; the valuation fixed by them shall be final and conclusive."

There is no discrimination *against* the R. R. Co. in this provision; for in addition to a similar provision with reference to assessments made by County Assessors of the property of other taxpayers, to be found in § 3633 of the same code, § 3632 imposes an *additional* penalty of one hundred dollars for every such failure or refusal on the part of any of such taxpayers,

"The right to discriminate in some manner against those who fail to hand in lists has been often recognized.

When the discrimination consists merely in submitting the party to the 'doom' of the assessor and depriving him of any appeal, it would seem that there could be no valid objection to it."

Cooley on Taxation (Ed. 1876), p. 262, and cases cited in notes 1 and 2.

It cannot be contended by the plaintiff in error that the State Board of Equalization did not designate the officer of the company by whom such statement should be made, for the reasons:

a1. It is a *prima facie* presumption that official duty has been regularly performed.

Code of Civil Procedure, §1963, Sub. 15.

b1. Neither the answer nor petition shows that the designation was made, but the complaint which is in the statutory form, and therefore sufficient, alleges that the defendant is indebted to the plaintiff in the amount of taxes claimed, and that simple allegation is equivalent to and includes and embraces allegations of *all* facts, steps or proceedings which would otherwise have been required of the pleader to set forth in the complaint to show a valid tax; and if such designation is necessary to the validity of the taxes in question, the complaint in effect alleges that such designation was made, and the judgment adjudicated it.

c. But again: The Political Code (§ 3899) provided that if the taxes were not paid the County Tax Collector on the direction of the State Controller should offer the

property once for sale, and if there should be no purchaser the collector should then bring a civil action in the proper Court in the name of the people to collect the taxes.

This applies not only to the taxes of the R. R. Co., but to all taxes amounting to three hundred dollars.

Under that provision this action is prosecuted.

In this action the company could defend, (and in fact did file its answer) and show any illegality in the tax.

McMillen vs. Anderson, 95 U. S., 37.

This would of itself seem to us to bring this case on these points as to the due process of law and the right of the company to the equal protection of the law within the principles settled by this Court in its very recent decision in the Kentucky Railroad Tax Cases—only a short telegraphic synopsis of which opinions we have up to this time been permitted to see.

We have thought it advisable to say this much on the merits of the constitutional questions, which the plaintiff in error alleges to be involved, with the belief that a consideration of them will show that no real or substantial Federal questions exist and the action is not a proper case to be removed from a State to the Circuit Court and for that reason the State Courts did not lose jurisdiction.

We ask that the judgment of the State Court be affirmed.

Respectfully submitted,

~~SMITH, BROWN & HUTTON, and~~
~~S. M. WHITE,~~ R. M. Hidney
Attorneys for Defendant in Error.

Service accepted by copy this, the.....

day of.....*A. D. 1885.*

.....

Attorneys for Plaintiff in Error.

6. Argt

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IN THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR WRIT OF HABEAS CORPUS BY WASH. F. LOTHROP.

W. H. HILWELL,
Attorney in Arizona.

A. X. PARKER,
Of Counsel in Supreme Court.

IN THE SUPREME COURT OF THE UNITED STATES.

THE MATTER OF THE PETITION OF WASH. F. LOTHROP FOR A WRIT OF HABEAS CORPUS.

To the Supreme Court of the United States:

The petitioner, Wash. F. Lothrop, of Cochise County, Territory of Arizona, complaining, shows that he is unjustly and unlawfully detained and imprisoned by Robert S. Hatch, Sheriff of said Cochise County, in the jail at Tombstone, said County and Territory.

That the cause of said illegal confinement is a warrant of commitment issued by a so-called County Court of said County, committing the petitioner to the Territorial prison at Yuma, in said Territory, for an offense of grand larceny.

Your petitioner shows that the said County Court of Cochise County was attempted to be "created and established" by the Territorial Legislature by an act passed, and approved March 12th, 1885, and entitled: "An act to create and establish a County Court, in the County of Cochise, Territory of Arizona, define its jurisdiction, prescribe its proceedure, to abolish the Probate Court of said County, provide for the transfer of its jurisdiction to the County Court, and for other matters incidental thereto and connected therewith."

That said County Court has full concurrent jurisdiction,

in law and equity, original and appellate with the District Court in said County.

And your petitioner claims that the Territorial Legislature exceeded its authority in attempting to create said Court, and that said Act of said Legislature is in conflict with the laws of the United States, organizing said Territory, establishing a system of courts therein, and limiting the jurisdiction thereof.

And your petitioner further shows that after a conviction and judgment in said Court had been rendered against him, he petitioned the Honorable William H. Barnes, Judge of the District Court of the First Judicial District of the Territory of Arizona, for writ of *habeas corpus*, that a writ by said Judge was ordered and duly issued, made returnable before said Judge, at his chambers in Tucson, Arizona, on the 24th day of November, 1885.

That said Sheriff made return to said writ, that he held your petitioner in jail by virtue of a warrant of commitment of said County Court; that the only question presented by said proceeding was the legality of said County Court of Cochise County; that said Judge dismissed said writ, and remanded your petitioner to the custody from whence he was taken.

That said Sheriff has been further ordered, by said Judge, to retain the custody of your petitioner until the further order of said Court, or of the Supreme Court of the United States.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said Robert S. Hatch, may issue in this behalf, so that your petitioner may be forthwith brought before this Court, that the record of the proceedings had before the said District Judge may be brought up, that there may be done what the law may require.

W. F. LOTHROP.

UNITED STATES OF AMERICA,
Territory of Arizona, County of Cochise. } *ss.*

Wash. F. Lothrop being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him. That he has read the same and knows the contents, and that the statements therein made are true as he verily believes.

WASH. F. LOTHROP.

Subscribed and sworn to this 1st day of December, 1885.

[SEAL.] B. A. FICKAS,
Clerk, District Court 1st Judicial District,
Cochise County, Arizona Territory.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 6, Original.

Return to Rule.

Ex Parte in the Matter of WASH. F. LATHROP, Petitioner, on Petition for a Writ of *Habeas Corpus.*

Surrule upon the sheriff of Cochise county, Territory of Arizona, to show cause why the writ of *habeas corpus* should not issue as in said petition prayed for.

And now comes Robert S. Hatch, sheriff of Cochise county, Territory of Arizona, and, in answer to the said rule to show cause, respectfully shows to the court here that true it is that the said Wash. F. Lathrop, the petitioner, is detained and imprisoned by this respondent in the jail at Tombstone, in said county and Territory, and alleges that the said Wash. F. Lathrop is so restrained by virtue of a warrant of commitment issued out of the county court of Cochise county, aforesaid, a copy of which commitment is hereto annexed, marked Exhibit "A," and also of an order made by the Honorable William H. Barnes, judge of the district court of the first judicial district of the Territory of Arizona aforesaid, upon the petition of the said Wash. F. Lathrop for a writ of *habeas corpus*, as in his present petition to this honorable court correctly recited and alleged.

And this respondent further shows to the court here that true it is that the said county court was created and established by the Territorial Legislature, as in the said petition of the said Wash. F. Lathrop recited and alleged, and that it has full and concurrent jurisdiction in law and in equity, original and appellate, with the district court in said county, but this respondent submits that the Territorial Legislature did not exceed its authority in attempting to create said court, and that said act of said Legislature is not in conflict with any of the laws of the United States.

And this respondent further submits to the court here that the Congress of the United States did not by the act organizing the said Territory of Arizona, or by any act to amend the same, or otherwise, establish a system of courts therein, but, on the contrary, vested the judicial power in said Territory in a supreme court, to consist of three judges, and such inferior courts as the Legislature thereof might by law prescribe, and that the said Legislature, in execution of the power and discretion so conferred upon them, and of the gen-

eral power conferred upon them by Congress over all rightful subjects of legislation, have from time to time created and established courts inferior to the said supreme court, viz., probate courts, courts of justices of the peace, and by the act approved March 12, 1885, in the said petition of the said Wash. F. Lathrop recited, the said county court of Cochise county.

Wherefore this respondent submits to the court here that the said Wash. F. Lathrop is rightfully and lawfully detained and imprisoned by him, as aforesaid, and he therefore prays that this rule may be discharged.

ROBERT S. HATCH,
Sheriff Cochise County, Arizona Ter.

THOMAS MITCHELL,
Att'y for Sheriff.

UNITED STATES OF AMERICA, }
Territory of Arizona, County of Cochise, } ss:

Robert S. Hatch, being first duly sworn, deposes and says that he is the sheriff of Cochise county, Arizona, and as such makes the foregoing return subscribed by him; that he has read the said return and knows the contents thereof, and that the facts therein stated are true.

ROBERT S. HATCH,
Sheriff Cochise County, A. T.

Sworn to and subscribed before me, this 17th day of March, A. D. 1886.

[Seal Notary Public Cochise County, Arizona Territory.]

ALLEN R. ENGLISH,
Notary Public, Cochise County, Arizona.

Convicted of Grand Larceny.

In the County Court of the County of Cochise, Territory of Arizona.

THE TERRITORY OF ARIZONA
against
W. F. LATHROP, Defendant.

NOV. 17TH, 1885.

The district attorney, with the defendant and his counsel, came into court. The defendant was duly informed by the court of the nature of the indictment found against him for the crime of grand larceny committed on the 1st day of October, 1885, arraignment and plea of "not guilty as charged in the indictment," trial, and the verdict of the jury on the 31st day of October, 1885, "guilty as charged in the indictment," with a recommendation for mercy. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment: That whereas the said W. F. Lathrop having been duly convicted in this court of the crime of grand larceny—

It is therefore ordered, adjudged, and decreed that the said W. F. Lathrop be punished by imprisonment in the territorial prison of the Territory of Arizona for the term of two (2) years from this date. The defendant was then remanded to the custody of the sheriff of said Cochise county to be by him delivered into the custody of the proper officers of the said territorial prison.

CLERK'S OFFICE, COUNTY COURT OF COCHISE COUNTY, *Territory of Arizona*, } ss:

I, A. O. Wallace, clerk of the said county court of Cochise county, Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the judgment duly made and entered on the minutes of the said county court in the above-entitled action, and that I have compared the same with the original; that the same is a correct transcript therefrom and of the whole thereof.

Attest my hand and the seal of the county court this 20th day of November, A. D. 1885.

[Seal County Court of Cochise County, Arizona.]

A. O. WALLACE, *Clerk*.

[Endorsed:] No. 11. County court of Cochise county, Arizona. The Territory of Arizona *vs.* W. F. Lathrop, defendant. Commitment. Filed ——, 188–. —— ——, clerk, by —— ——, deputy clerk. W. H. Stilwell, attorney for def't.

Endorsed on cover: Supreme Court U. S. 1885, October term. No. 6, original. *Ex parte* in the matter of Wash. F. Lathrop, petitioner. Return to rule. Office Supreme Court U. S. Filed Apr. 5, 1886. James H. McKenney, clerk.

118-13

Office Supreme Court U. S.
FILED.
MAR 1 1886
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

IN THE MATTER OF THE PETITION OF
WASH. F. LATHROP,
FOR A WRIT OF HABEAS CORPUS.

BRIEF ON BEHALF OF PETITIONER.

A. X. PARKER,
OF COUNSEL IN SUPREME COURT.
W. H. STILWELL,
ATTORNEY FOR PETITIONER IN ARIZONA.

Filed, January.....1886.

_____ *Clerk*

*By*_____ *Deputy Clerk*

DAILY EPITAPH PRINT, TOMBSTONE ARIZONA.

In the Supreme Court

OF THE

UNITED STATES.

IN THE MATTER OF THE PETITION OF

WASH. F. LATHROP,

FOR A WRIT OF HABEAS CORPUS.

Statement of Facts.

This in an application of Wash. F. Lathrop, of Arizona Territory, for a writ of *habeas corpus*.

Petitioner was tried and convicted of grand larceny, in the so-called County Court of Cochise

County, said Territory. The only question raised by the proceeding is the legality of said County Court. The Court was attempted to be "created and established" by an act of the Territorial Legislature, approved March 12th, 1885, and entitled "An act to create and establish a County Court in the County of Cochise, Territory of Arizona, define its jurisdiction, prescribe its procedure, to abolish the Probate Court of said County, provide for the transfer of its jurisdiction the County Court, and for other matters incidental thereto and connected therewith."

After the judgment of said Court against the petitioner had been pronounced on the 17th day of November, 1885, the petitioner applied to the Honorable William H. Barnes, (Associate Justice of the Supreme Court of the Territory, and Judge of the First Judicial District,) for a writ of *habeas corpus*. The writ was issued returnable before said Judge, at his chambers in Tucson, Arizona, on the 24th day of November, 1885. The Sheriff of said County of Cochise made return to said writ that he held the petitioner by authority of a warrant of commitment issued by said County Court, and appended to the said writ, as a part of his return thereto, a certified copy of said warrant of commitment.

The District Judge dismissed the writ, remanded the petitioner and ordered the Sheriff to retain the custody of the petitioner until the further order of said Judge, or of the Supreme Court of the United States. Thus giving petitioner an opportunity to apply for this writ.

The petitioner now applies to this Court for an original writ of *habeas corpus* and asks that the

record of the proceedings had before the Territorial Judge be brought up, and that the petitioner be delivered from said unlawful imprisonment.

ARGUMENT:

This application is made on the authority of ex parte Yerger, 8 Wall. 85; ex parte Milligin, 4 Wall. 2; ex parte Crow Dog, 109 U. S., 182; ex parte Yarbrough, 110 U. S., 652. And we claim this to be a proper case in which to grant a rule to show cause, assisted by a writ of *certiorari* to the Clerk of the Territorial District Court, at Tucson, Arizona, for the record of the proceedings had below.

The Act creating the County Court, (Act in full, appended hereto, marked "Ex. A.")

Section 1. Prescribes the qualifications of the Judge, and provides for his appointment by the Governor, until January 1st, 1887, and for his election in 1886 for a term of four years.

Section 2. Similar provisions in regard to the Clerk of the Court.

Section 4. Authorizes the Court to exercise original, general criminal and civil jurisdiction, equal concurrent, common law, equity and statutory, with the District Court in all cases of one hundred dollars in value.

Appeals are allowed to the Supreme Court of the Territory, in the same manner and in the same cases as appeals from the District Court to the Supreme Court of the Territory.

Section 6. Provides for the appointment of a Court Commissioner, with same powers, and compensation as the Commissioner of the District Court.

Section 7. Provides for the transfer of cases in

which the Judge is interested, to the District Court.

Section 11. Allows the present Probate Court to exist, as heretofore, until January 1, 1887, at which time it is abolished, and all records, files, jurisdiction, etc., are transfered to the County Court.

The Territory of Arizona was erected out of the Territory of New Mexico by an act approved February 24th, A. D. 1863. (C. 56, S. 2, vol. 12; Stat. at Large p. 665.) and embraced a region of country then but sparsely settled by white people, and with but limited property interests as compared with its present condition. The judicial power of the Territory was vested in a supreme court, to consist of three judges, and such inferior courts as the legislative council might by law "prescribe." The organic act after providing that the manner of appointing the Territorial officers, and that the powers, duties, etc., of the governor, legislative assembly, judges of the supreme court, etc., and subordinate officers mentioned, shall be the same as provided and conferred upon the same officers by the organic act organizing the Territorial government of New Mexico, goes on to say: "Which subordinate officers shall be appointed in the same manner, and not exceed in number those *created by said act and acts amendatory thereto, together* with all legislative enactments of the Territory of New Mexico, *not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation.*"

(Section 2, Or. Act of Arizona.)

The organic act of New Mexico provided that the Territory should be divided into three judicial districts, and that a district court should be held in each of said districts by one of the justices of the supreme court, at such time and place as might be "*prescribed*" by law, and that these judges should reside in the districts assigned them.

(Act of New Mexico § 10.)

That "temporarily and until otherwise provided by law, the governor of said Territory (New Mexico) may define the judicial districts of said Territory and assign the judges who may be appointed for said Territory to the several districts, and also appoint the times and places for holding courts in the several counties, or subdivisions, in each of said judicial districts by proclamations to be issued by him." These matters were to be regulated afterward by the legislature.

(Organic Act of New Mexico, § 16.)

It can not be successfully claimed that these provisions did not apply to, and have not been acted upon by the governors and legislatures of Arizona ever since the organization of this Territory, until the passage of the act in question.

Similar provisions are embraced in Sections 1873 and 1874 of the Revised Statutes of the U. S., and apply to *each Territory*.

Section 10 of the organic act of New Mexico also provides, "That the jurisdiction of the several courts herein (therein) provided for, both appellate and original, and of the probate courts and justices of the peace, *shall be as limited by law*."

It must certainly have been the intention of Congress, when the organic act of Arizona was passed, to have the last quoted portion of the act

for New Mexico apply to Arizona. It was not, as a supervisory provision, *inconsistent* with the organic act of Arizona.

There can be no doubt upon this point, at least since the adoption of the Revised Statutes. The language of Section 1866 R. S., is the same as the last quoted portion of the act of New Mexico—excepting the omission of the word "as" (undoubtedly a typographical error) and applies as particularly to Arizona as to any other Territory.

Section 1907 Revised Statutes, provides that "The judicial power in New Mexico, Utah, "Washington, Colorado, Dakota, Idaho, Mon-"tana and Wyoming, shall be vested in a supreme "court, district courts, probate courts and in jus-"tices of the peace."

Section 1908 R. S. provides that, "The judi-"cial power in Arizona shall be vested in a su-"preme court and such inferior courts as the "legislative council may by law *prescribe*."

Taking Sections 1907 and 1908 alone, and the power to fix and regulate both the original and appellate jurisdiction of all Territorial courts would, apparently, (though contrary to the long established custom of congress.) be left to the legislatures of the Territories, respectively.

Section 1866 R. S., provides that, "The jurisdiction, both appellate and original, of the courts provided for in Section Nineteen hundred and seven and Nineteen hundred and eight, shall be (as) limited by law."

There can be no doubt as to the application of this section of the Revised Statutes to the Territory of Arizona, being the same in force and effect, as to any other Territory, and that the same lan-

guage embraced in the organic act of New Mexico, applied in like manner to Arizona, *unless it was then inconsistent with the provisions of the organic act of Arizona.*

The courts to be "prescribed" for Arizona were, therefore, such courts, in character and jurisdiction, as existed in the Territory of New Mexico. And it was left to the legislative council to "*prescribe*" for the Territory, at such time, and to such extent as the interests of the Territory, in the judgement of the council, might from time to time require.

In the year of 1863, the Territorial district judges were undoubtedly able to attend to all the litigation of their respective districts by holding court in but one place in each district. When the Territory advanced in population and property interests and should require district and inferior courts in each county, or subdivision of the judicial districts, the Territorial council had the power to "prescribe" such courts as, and with jurisdiction similar to, the courts established at first, and still existing in the Territory of New Mexico, (Compiled Laws of Arizona, 1864 and 1871, pages 375 to 516). The condition of the region of country cut off from New Mexico and erected into a temporary government by the name of Arizona, was, likely, well understood by congress—that it did not require, at that time, such extensive governmental machinery as Territories more thickly settled and with larger property interests.

New Mexico was allowed a council, consisting of thirteen members and a house of representatives, consisting of twenty-six members, while Arizona was, at that time, allowed a council, consisting of but nine members, and but eighteen

members in the house of representatives.

(Or. Act of New Mexico, § 5; of Arizona § 2.

The policy of the general government, in regard to Territorial governments, has been uniform to a remarkable degree, from the adoption of the first ordinance relating to the North-west Territory, in 1787, and particularly on the subject of Territorial judiciary. Never, (except in the case of Florida,) allowing the citizens, or officials, of a Territory to elect or appoint Territorial judges, other than probate and justices of the peace; and the jurisdiction of all courts in Territories has always been closely supervised, if not particularly limited, by congress.

The county court of Cochise county could as well, (at the pleasure of the legislature) be styled a "Probate Court" with the same jurisdiction given to the County Court, if there is no limit on the powers of the legislature of Arizona in regard to "prescribing" inferior courts, and limiting their jurisdiction.

It has not been the custom of the general government to permit Territorial Legislatures to create courts with jurisdiction sufficiently great to enable litigants to evade the District Courts in the several counties, or subdivisions of the judicial districts; and a different rule, or privilege, to be first established at this date, should, we contend, be founded on different—clearer—expressions than those used in the Organic Act of Arizona.

Under the construction we ask, Arizona has a judicial system similar, and equal to that of other territories of the United States. That this is the construction given to the Organic Act of Arizona by every legislature of the Territory for a period

of more than twenty years, is evidenced by the fact that until the last session of the Territorial Legislature, Arizona has had no law "*prescribing*" any court differing from the courts existing in other territories. While on the other hand, courts—district, probate and justices of the peace—similar in jurisdiction to the courts of other territories, have long been "prescribed," and are now existing in every county of Arizona.

Com. Laws of Arizona, 1864 and 1871; 375 to 516.

Com. Laws of Arizona, 1877; 395 to 399.

People vs. Maxon, 1 Idaho, 335.

This construction is also consistent with the theory of the several government, of leaving to the inhabitants of the Territory all powers of self government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress.

Clinton vs. Englebrecht, 13 Wall. 441.

Moore vs. Koubly, 1 Idaho, 55.

People vs. Maxon, 1 Idaho, 330.

Greathouse vs. Heed, 1 Idaho, 494.

FLORIDA.

The act creating a government for Florida, was full and complete in itself. It provided for "two Superior Courts, and * * * such inferior courts and justices of the peace, as the Legislative Council of the Territory may from time to time "*establish.*'" It defines the jurisdictional limits of each (superior) court, and then goes on to say, "within the limits herein described, each (superior) "court shall have jurisdiction in all criminal cases "and *exclusive jurisdiction in all capital offenses*, "and original jurisdiction in all civil cases of the

"value of one hundred dollars arising under, and "cognizable by the laws of the Territory, now in "force therein, or which may at any time be en- "acted by the legislative council thereof." No other Territorial government, or organic act of any other Territory, or law of congress, is referred to, or adopted, otherwise limiting the jurisdiction of its courts, as is the case in the act of Arizona But the Florida act giving to the superior courts jurisdiction over all matters arising under the laws of the Territory of the value of One Hundred dollars, and *exclusive jurisdiction* in capital cases, shows a clear intention to permit other courts to be "*established*" with jurisdiction *concurrent* with the superior courts in all matters arising under the Territorial laws, *except in capital cases.*

Insurance Co. vs. Canter, 1 Peter 511.

Benner *et al.* vs. Porter, 9 How, 235.

Thompson's Digs. p. 585 Appx. (Where all the acts relating to Florida are collected, and which we cannot obtain in Arizona.)

APPEALS ALLWOED TO THE SUPREME COURT OF THE TERRITORY FROM DISTRICT COURTS ONLY.

Section 1869 Rev. Stat., provides that "writs of "error, bills of exceptions and appeals shall be al- "lowed in all cases from the final decisions of the "district courts to the supreme court of *all the Ter- "ritories, respectively*, under such regulations as "may be "*prescribed*" by law. * * * This section does not seem to contemplate that the Territorial legislature of any Territory shall "pre- scribe" regulations for appeals or writs of error from *any other territorial court* to the *supreme court of any territory.*

The rigtht of appeal from the pobate court of Col-

orado Territory to the supreme court of the Territory, was specially authorized by Congress, the details and regulations of which were to be *"prescribed"* by the Territorial legislature.

Revised Statutes, Sections 1930 and 1931,

The same case is shown in the matter of the jurisdiction of, and appeal from the probate court of Montana.

Rev. Stat. § 1932.

If Congress has, by section 1866, R. S., thus reserved the power and right, exclusively, to make such changes as the above, in the original and appellate jurisdiction of the courts in Colorado, Montana and Utah Territories, we contend that Congress has, by the same section, reserved to itself the same exclusive supervisory power and authority pertaining to the jurisdiction and character of courts in all other Territories now existing.

Ferris vs. Higley, 20 Wall. 383.

Moore vs. Koubly, 1 Idaho, 55.

People vs. Maxon, id. 330, 334.

Greathouse vs. Heed, id. 494.

The word *"prescribe"* used in the organic act of Arizona, and also in other congression laws authorizing Territorial legislation relating to Territorial courts, does not confer upon the Territorial Legislature power to do more than simply complete the detail regulations necessary to enable the Territorial courts created or authorized by Congress, to exercise the jurisdiction conferred by Congress upon such courts.

Revised Statutes of U. S., Sections 1860, 1865, 1869, 1874, 1930 and 1931.

A. X. PARKER,
Of Counsel in Supreme Court.

W. H. STILWELL,
Attorney for Petitioner, in Arizona.

"EXHIBIT A."—AN ACT

To create and establish a county court in the County of Cochise, Territory of Arizona, define its jurisdiction prescribe its procedure, to abolish the Probate court of said county, provide for the transfer of its jurisdiction to the County courts and for other matters incidental thereto and connected therewith.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. There is hereby established, and shall be in the County of Cochise, Territory of Arizona, a County Court, and for said Court a County Judge (who shall be an attorney and counsellor at law, and shall be a citizen of the United States and of this Territory, and shall have been a resident of the Territory for two years next preceding his appointment or election) shall be elected by the qualified voters of the County of Cochise, at the general election to be held in the year 1886, and at each alternate general election thereafter. The County Judge of said County shall hold his office for the term of four years from the first day of January next after his election. In case of a vacancy in the office, by death, removal from the Territory, resignation or by impeachment or removal, or from any other cause, the Governor of the Territory is hereby empowered to and shall appoint a County Judge (who shall have the qualifications required by this Section) to fill such vacancy, and at the next general election thereafter a County Judge shall be elected to serve for four years from the first day of January next succeeding his election. Within twenty days after the passage of this Act the Governor shall appoint, under the provisions of this Act, a County Judge in and for said County of Cochise, Territory of Arizona, who shall hold office until the first day of January, A. D. 1887.

SEC. 2. There shall be a County Clerk in and for said Cochise County who shall be elected at the general election to be held in 1886, and at each succeeding general election thereafter, who shall be the Clerk of the

County Court, and who shall perform such other duties as may be hereafter imposed upon such office by law. In case of vacancy in said office from any cause whatever the Governor of the Territory shall fill the same by appointment for the remainder of the unexpired term. The County Clerk shall hold his office for two years from the first day of January next after his election or appointment as herein prescribed. Within twenty days after the passage of this Act the Governor shall appoint a County Clerk for said Cochise County who shall be a resident of the County wherein he shall be appointed, and who shall hold his office until the first day of January, 1887. The County Clerk of said Cochise County shall give such bond to the Territory for the faithful performance of his duties in such sum as may be fixed by the Board of Supervisors of said County, to be not less than three thousand dollars and not to exceed five thousand dollars.

SEC. 3. The Sheriff of the County, by himself or deputies, shall attend all sessions of the County Court, and serve and execute all writs processes, mandates, orders and judgments of said Court to the same extent and in the same manner as he is now in all other Courts and in all other cases required by law to do.

SEC. 4. Said County Court shall be a Court of Record, having a Seal with the Coat-of-Arms of the Territory and "County Court, Cochise County, Arizona," sunk or engraved thereon, and said County Court shall have original, general, criminal and civil jurisdiction except as hereafter limited, and shall have equal concurrent common law, equitable and statutory jurisdiction with the District Courts in all cases. The County Court of said Cochise County shall have original concurrent jurisdiction with the District Courts in all cases of equity and in all cases at law which involve the title or possession of real property or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars or more, and in all criminal cases amounting to felony, and cases of mis-

demeanor not otherwise provided for, of all actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, of all matters of probate, of divorce and for annulment of marriage, and all matters incidental thereto or connected therewith, and of all such special cases and proceedings as are not otherwise provided for. And said Court shall have the power of naturalization and to issue papers therefor. Said County Courts shall have appellate jurisdiction in all cases arising in Justices and other inferior Courts in said Cochise County, in the same manner and to the same extent as is now allowed by law on appeals from such Courts to the District Courts. The said County Court of Cochise County shall be always open, legal holidays and non-judicial days excepted, and its process shall extend to all parts of the Territory; PROVIDED, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate shall be commenced in the County in which the real estate, or any part thereof, affected by such action or actions, is situated. Said County Court and the Judge thereof shall have power to issue writs of mandamus, certiorari, injunction, prohibition, quo warranto and habeas corpus on petition, by or on behalf of any person in actual custody in said Cochise County. Injunctions, writs of prohibition and habeas corpus may be issued and served on legal holidays and non-judicial days, and all Acts and parts of Acts granting and conferring jurisdiction to and upon the District Courts and describing their civil and criminal procedure shall be and is here made applicable to the County Court of Cochise County. Appeals shall be taken from the County Court to the Supreme Court of this Territory in the same manner and in the same cases as are now allowed by law in appeals from the District and Probate Courts to the Supreme Court.

SEC. 5. The County Judge and the County Clerk shall reside at the County Seat of said Cochise County, and the County Judge and the County Clerk shall not be absent from said County more than thirty days during

each calendar year, and any greater absence than is herein allowed shall render the office vacant, which vacancy shall, within fifteen days thereafter, be filled by appointment as herein provided.

SEC. 6. The County Judge shall have the power to appoint a Court Commissioner, who shall have all the powers now conferred by law on the Court Commissioners of the District Courts, and whose term of office shall last during the term of the County Judge. The compensation, fees or salary of the County Court Commissioner of Cochise shall be the same as the compensation, fees or salary of the District Court Commissioner.

SEC. 7. When the County Judge of said Cochise County is interested in any suit, matter or proceeding pending in his Court, or has been attorney or counsel therein, or is related to either party thereto, he shall cease to further act upon the case, unless with the joint consent of all parties appearing upon the record, and the case, matter or proceeding shall thereupon be certified to the District Court in and for said Cochise County, and full jurisdiction of the case, matter or proceeding shall vest in the District Court.

SEC. 8. The County Judge shall be a magistrate of, for and within said County of Cochise, to the same extent, in the same cases and with the same powers granted by law to other magistrates.

SEC. 9. The County Clerk of said Cochise County may appoint one or more deputies, for whose acts he shall be responsible on his official bond. He shall keep such records, papers and files of his Court as are required by law to be kept by the Clerks of the District Court, and shall perform in and for the County Court and the Judge thereof the same duties that are now required by law of the Clerks of the District Courts in and for their respective Courts and Judges, and he shall receive for his services the sum of twelve hundred dollars per annum, in lieu of fees, and he shall charge the same fees as are now received by Clerks of the District Courts for similar services, and he shall pay the said fees into the General Fund of said Cochise County Treasury at the

end of each and every calendar month, and he shall file therewith, with the County Treasurer, a sworn statement in detail of the amount of fees received by him and the sources and persons from whence and whom received during the past calendar month, and he shall file a duplicate of said sworn statement with the Clerk of the Board of Supervisors at the same time, and he shall at the same time take receipts in duplicate of such payments from the County Treasurer, and shall thereupon file one of said receipts with the said Clerk of the Board of Supervisors.

SEC. 10. All persons charged with crime and held to bail or committed to custody by any committing Magistrate within the County of Cochise, where such person is held or committed shall be held to appear or commited to custody and ordered to appear (and in the manner now provided by law) before the first Grand Jury of the District Court or of the County Court of said County that shall be impaneled after such person is held or committed as aforesaid.

SEC. 11. The Probate Court of the County of Cochise shall continue to exist and retain and exercise the jurisdiction now and heretofore held and exercised by such courts and the judge thereof, anything in this act to the contrary notwithstanding, until the first day of January, A. D. 1887, at which time said Probate Court of Cochise county is hereby declared to be and shall be abolished, and the records and files, papers thereof, all causes and matters pending therein, and the jurisdiction then held and exercised by the said Probate court and the judge thereof, shall be transferred to the county court of said Cochise county, and the said County court shall thereupon and thereafter without any lapse of jurisdiction of any of said causes or matters or jurisdiction so transferred have, hold and exercise said jurisdiction and proceed with all such cases, causes, and matters, and shall hear, determine and adjudge the same under the provisions of Chapters XXVI, XXVIII, XXIX, and all other Chapters of the Compiled Laws of Arizona and all other laws, acts and parts of acts, conferring juris-

diction upon the Probate courts or the judges thereof, with the same powers, force and effect as said Probate courts could and would exercise prior to the passage of this act abolishing said court and transferring its jurisdiction to the County court of Cochise county as herein provided.

SEC. 12. The County Judge of Cochise county shall receive no fees or compensation whatever, other than the annual salary herein prescribed, which salary shall be two thousand dollars, to be paid quarterly out of the General Fund of the county.

SEC. 13. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

SEC. 14. This Act shall take effect and be in force from and after its passage.

Approved, March 12, 1885.

116-13

Office Supreme Court U. S.
FILED
APR 9 1886
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

EX PARTE WASH. F. LATHROP.

Petition for Habeas Corpus.

THOS. MITCHELL.
Attorney for the Sheriff.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1886.

In the Supreme Court of the United States.

EX PARTE WASH. F. LATHROP.

Petition for Habeas Corpus.

Sur Rule upon the Sheriff of Cochise County, Arizona, to show cause why a writ of Habeas Corpus should not issue.

Brief for the Sheriff.

The only question presented by the record in this case is the validity of the act of the legislature of the Territory of Arizona creating the county court of Cochise county. And the only ground upon which the invalidity of the act is claimed is that the territorial legislature had no *power* to create the court.

This is a question the determination of which depends, in the first place, upon an examination of the organic law of the Territory. But as that act was passed prior to December 1, 1873, and its provisions are now embraced in the Rev. Stat. U. S., the latter must be consulted to ascertain what the law now is.

Rev. Stat. U. S., sec. 5596.

State *v.* Brown, 100 U. S., 508.

Sec. 1851, Rev. Stat. U. S., provides—

"The legislative power of every Territory shall extend "to all rightful subjects of legislation not inconsistent "with the Constitution and laws of the United States."

It is not contended on the other side, if we understand them, that the act in question is not a rightful subject of legislation, nor that it is in any way inconsistent with the Constitution. It certainly could not be successfully contended.

Ferris *v.* Higley, 20 Wall., 375–380.

There remains, then, only the further inquiry whether it is inconsistent with the laws of the United States.

Sec. 1908 Rev. Stat. U. S., provides—

"The judicial power in Arizona shall be vested in a "supreme court and such inferior courts as the legislative "council may by law prescribe."

This is a re-enactment in the exact language of the organic act, and if Arizona were the only Territory and this the only organic law, it is conceived that the present question never would have been raised.

But there had been a number of Territories prior to the Territory of Arizona, and the grant of judicial power in those which existed at the time of the revision of the statutes is contained in sec. 1907, Rev. Stat., which provides:

"The judicial power in New Mexico, Utah, Washing- "ton, Colorado, Dakato, Idaho, Montana, and Wyoming, "shall be vested in a supreme court, district courts, pro- "bate courts, and in justices of the peace."

And the argument on the other side seems to be that because it has been the settled policy of Congress to establish a complete judicial system for the Territories, consist-

ing of the courts named in this last section, therefore that is the system intended for Arizona and that alone.

But we submit that according to every rule for the construction of statutes, or in fact of any writing, that this is a fallacious conclusion.

In the first place, if the language of sec. 1908 were of doubtful meaning, the fact that it is different from that of sec. 1907 would of itself show that it was intended to express a different meaning. But the meaning of the language used is not doubtful. The manifest meaning of the language is to create a supreme court and to authorize and empower the territorial legislature to create the necessary inferior courts.

It would be idle in this Court to cite authorities in support of these points.

The legislative power of the Territory of Arizona was vested in the governor and legislative assembly, the latter to consist of a council and house of representatives; and it is contended on the other side that as the power to prescribe inferior courts, &c., was given to the "legislative "council," it cannot be exercised by the legislature. But we submit that as the courts are to be prescribed "by law," and as the council cannot enact a law, the words, legislative council, must be held to mean the legislative body—the only body that can prescribe anything by law. But if this were not so, it is conceived that the joint action of the lower house and the approval of the governor would not invalidate the act of the council.

The criticism on the word, "prescribe," can certainly require no answer. "Ordain and establish" are synonyms given by Webster for the word "prescribe," and they are the words used in the same connection in the Constitution of the United States. "The judicial power of the United "States shall be vested in one supreme court, and in such

"inferior courts as the Congress may from time to time "ordain and establish."

On page 9 of the brief, on behalf of the petition, it is said that "district, probate, and justices of the peace— "similar in jurisdiction to the courts of other Territories— "have long been 'prescribed' and are now existing in "every county of Arizona."

And it might have been added that they were "pre- "scribed" by laws regularly enacted by the legislature and approved by the governor, and that the only pretence of authority for such laws is found in the provision of the organic act now found in sec. 1908, Rev. Stat. U. S.

In the other Territories, Congress created probate courts and justices of the peace, but they created none such for Arizona, and if the legislature has no power to create the county court they have none to create the probate courts or justices' court.

In regard to the argument based on section 1866, Rev. Stat. U. S., the apparent intention of which is to suggest that the jurisdiction of all the courts in the Territories is "as limited by law" of Congress we simply refer to—

Ferris *v.* Higley, *ut supra.*

Hornbuckle *v.* Toombs, 18 Wall., 648–655.

If the argument on the other side be stripped of the "conjectures" as to the meaning of Congress which it seeks to substitute for the meaning of the language which Congress has used, and of the hypercriticisms on particular words in that language, it will be found to rest entirely upon the fallacy of assuming that the jurisdiction of the district courts in the several counties of Arizona is necessarily exclusive.

That these district courts exist is undoubted, and the act now before the Court expressly refers to them as exist-

ing when it confers upon the county courts "equal con-
"current jurisdiction with the district courts in all cases."

Whether these courts are created by Congress or by the territorial legislature is an irrelevant question in the present case.

Admitting, for the sake of this argument, that they were created by Congress and derive their power from the general grant of chancery and common law jurisdiction to the supreme court and district courts in every Territory contained in section 1868 Rev. Stat., U. S., still we submit that there is nothing in the law making their jurisdiction necessarily exclusive in Arizona.

This was expressly decided by this Court in American Ins. Co. *v.* Carter, (1 Peters, 511.)

That was a case which arose in the Territory of Florida.

The organic act of that Territory provided—

"The judicial power shall be vested in two superior
"courts, and in such inferior courts and justices of the
"peace as the legislative council of the Territory may
"from time to time establish."

After prescribing the place of session and the jurisdictional limits of each court the act proceeds to say:

"Within the limits herein described, each court shall have
"jurisdiction in all criminal cases, and exclusive jurisdiction
"in all capital offences, and original jurisdiction in all civil
"cases of the value of one hundred dollars, arising under
"and cognizable by the laws of the Territory now in force
"therein, or which may at any time be enacted by the legis-
"lative council thereof."

The legislature having by law created a court to consist of a notary and five jurors to try and determine cases of salvage, the question before this court was whether the legislature had power to enact such a law.

The argument of the case took a wide range, but it does not seem to have occurred to the eminent counsel, who contended against the validity of the law, to suggest even that the plain language of the organic act conferring power on the legislature to establish inferior courts did not mean what it said.

Another section of the organic act had conferred upon the superior courts the same jurisdiction within its limits in all cases arising under the laws and Constitution of the United States as was vested in the United States District Court of Kentucky District, and the contention was that salvage was a branch of admiralty law, and, under the Constitution, the jurisdiction in such cases was vested in the United States courts, and that the Congress had conferred this jurisdiction on the superior courts and the territorial legislature could not confer it on a court created by them. In other words, it was contended that because Congress had conferred this jurisdiction on the superior courts therefore such jurisdiction was exclusive.

But Chief-Justice Marshall, in delivering the opinion of the court sustaining the act of the territorial legislature, used this language, which we submit is conclusive of the present question:

"The 7th section of the act of 1823 vests the whole judi-
"cial power of the Territory 'in two superior courts, and
"'in such inferior courts and justices of the peace as the
"'legislative council of the Territory may from time to time
"'establish.' *This general grant is common to the superior*
"*and inferior courts; and their jurisdiction is concurrent,*
"except so far as it may be made exclusive in either by
"other provisions of the statute. The jurisdiction of the
"superior courts is declared to be exclusive over capital
"offences; *on every other question* over which those courts
"may take cognizance by virtue of this section, *concurrent*
"*jurisdiction may be given to the inferior courts.*" (1 Peters, 544.)

There is nothing in conflict with this view in the later decision of this Court in Ferris *v.* Higley, (20 Wall., 380.)

That case merely decided that the legislature of Utah could not confer general jurisdiction upon the probate courts *created by Congress* for that Territory, for reasons which must commend themselves to every one's judgment.

And the manifest distinction between section 1907, Rev. Stat., which was then in the mind of the Court, and section 1908, under which this case arises, takes away all force from the dicta with which the opinion in that case concludes.

THOMAS MITCHELL,
Att'y for the Sheriff.

118-13

Office Supreme Court U. S.
FILED.
MAR 29 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

EX PARTE WASH. F. LOTHROP.

PETITION FOR HABEAS CORPUS.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Interveners.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1886.

In the Supreme Court of the United States.

Ex parte WASH. F. LOTHROP.

Petition for Habeas Corpus.

The sole question involved in this proceeding is this:

Had the Legislature of Arizona the legal power to create the County Court of Cochise county in which court the petitioner was convicted of grand larceny? If it had, the petition must be dismissed. If it had not, the petitioner must be discharged. We do not appear for the petitioner. The question involved is one which affects the legal profession and the public at large in that Territory. We have been requested to appear in their behalf, and suggest some considerations in support of the legality of that court.

Permission has already been granted by this Court for that purpose.

There are three other counties in Arizona in which county courts, precisely like the one in Cochise county, have been created. These courts have rendered judgments in civil cases, in the aggregate, for large amounts. They have tried and convicted numerous persons of criminal offences. They have acted as courts of probate, and, in brief, performed all the functions of courts of extended jurisdiction. They have furnished litigants with a speedy trial, which it was impossible for them to have under the practice before their creation.

They were established for the purpose of relieving the over-crowded dockets of the District Courts and giving more time to the Judges of the Supreme Court to dispose of its accumulated business. They have proved useful and satisfactory, and ought not now to be stricken down and all their acts declared null and void unless it is clear that they are illegal tribunals.

It is argued that this Cochise County Court is illegal because the act creating it is "inconsistent with the Con-" stitution and laws of the United States."

That it is not inconsistent with the Constitution follows from the reasoning of this Court in Ferris *v.* Higley, 20 Wall., 380.

Is it inconsistent with the laws of the United States?

Section 1851 of the Revised Statutes of the United States provides that:

"The legislative power of every Territory shall extend "to all rightful subjects of legislation not inconsistent "with the Constitution and laws of the United States."

That the creation of courts in which the invasion of private rights can be corrected and criminal acts punished is a rightful subject of legislation no one can doubt. It follows, therefore, that the territorial legislature may do that very thing unless there is some act of Congress which regulates the whole subject and thereby takes from the territorial legislature the power to act.

It will be our object to show that this has not been done by Congress.

The Revised Statutes regulate this subject. They must be consulted to ascertain what the law now is in relation to the Territories and their several courts. They are a new enactment and repeal all the old statutes. (Sec. 5596.)

Their provisions must control, though they may be dif-

ferent from the original laws which are revised. (United States *v.* Bowen, 100 U. S., 508.)

Section 1908 is in these words:

"The judicial power in Arizona shall be vested in a "Supreme Court and such inferior courts as the legisla- "tive council may by law prescribe."

Sec. 1866 provides that—

"The jurisdiction, both appellate and original, of the "courts, provided for in sections 1907 and 1908, shall be "limited by law."

Section 1907, referred to above, is as follows:

"The judicial power in New Mexico, Utah, Washington, "Colorado, Dakota, Idaho, Montana, and Wyoming, shall "be vested in a supreme court, district courts, probate "courts, and in justices of the peace."

There is a marked difference in the provisions relating to Arizona and the other Territories enumerated.

In Arizona the judicial power is vested in a supreme Court and such inferior courts as the legislative council may by law prescribe.

In the other Territories, the specific courts in which the judicial power shall be vested, are named.

Congress seems to have made a distinction between Arizona and the other Territories. We have nothing to do with the reasons which induced such legislation. The fact is it exists, and the question now is whether the legislature of Arizona can create a county court, and clothe it with the jurisdiction given to the Cochise County Court, and not whether the legislatures of any of the other Territories can create such a court.

We shall assume that the designation, "legislative coun-

cil," was intended to represent the law-making power, and be the equivalent of the "legislative assembly."

But, should this Court be of opinion that the words are to be construed literally, then the act is not invalid because it was passed by the legislative council and the House of Representatives. The action of the latter body may be wholly rejected, and the law will stand.

The questions made in the case now before the Court were long since brought to the attention of this Court, and decided adversly to the claims of this petitioner. We refer to the case of American Insurance Company *v.* Canter, 1 Peters, 511.

The plaintiff had insured certain cotton which had been shipped from New Orleans to Havre de Grace in France, been wrecked on the coast of Florida, carried by the salvors into Key West, and sold under a decree of court, consisting of a *notary and five jurors*, proceeding under an act of the Governor and legislative council of Florida passed in 1823.

The question depended solely upon the legality of the creation of said court. It was contended that the court was not legally created because the Constitution and laws of the United States were in full force in Florida; because the subject of salvage was not a rightful subject of legislation for the territorial government of Florida; because the superior courts of that Territory were vested with exclusive jurisdiction in admiralty and maritime cases; because, even if the jurisdiction of said courts was confined to "cases arising under the Constitution and laws of the "United States," this was a case of that class; and because the said superior courts were vested with original cognizance in all cases where the amount in issue exceeded one hundred dollars.

The provisions of the organic act of Florida were as follows:

"The judicial power shall be vested in two superior "courts, and in such inferior courts and justices of the "peace as the legislative council of the Territory may "from time to time establish."

"These legislative powers shall extend to all rightful "subjects of legislation."

"No law shall be valid which is inconsistent with the "laws and Constitution of the United States."

The case was argued by very eminent counsel; Mr. Ogden for the appellants, and Mr. Whipple and Mr. Webster for the claimants.

The opinion of the court was delivered by Chief-Justice Marshall.

After stating the case he said:

"The cause depends mainly on the question whether "the property in the cargo saved was changed by the sale "at Key West. The conformity of that sale to the order "under which it was made has not been controverted. "Its validity has been denied on the ground that it was "ordered by an incompetent tribunal.

"The tribunal was constituted by an act of the territo- "rial legislature of Florida passed on the 4th of July, "1823, which is inserted in the record. That act pur- "ports to give the power which has been exercised; con- "sequently the sale is valid if the territorial legislature "was competent to enact the law."

The learned chief-justice proceeds to discuss the power of Congress over the Territories, and places it upon that clause in the Constitution which provides that Congress shall have power "to make all needful rules and regula- "tions respecting the Territories and other property of the "United States," and also upon the ground that the right

to govern is an inevitable consequence of the right to acquire territory.

He then refers to the different provisions of the acts in relation to Florida, and says:

"The powers of the territorial legislature extend to "all rightful objects of legislation, subject to the restric- "tion that their laws shall not be inconsistent with the "laws and Constitution of the United States. As salvage "is admitted to come within this description the act is valid, "unless it can be brought within the restriction.

"The counsel for libellants contend that it is incon- "sistent with both the law and the Constitution; that it is "inconsistent with the provisions of the law by which the "territorial government was created, and with the amend- "atory act of 1823. It vests, they say, in an inferior "tribunal a jurisdiction which is by those acts vested ex- "clusively in the superior courts of the Territory."

"This argument requires an attentive consideration of "the sections which define the jurisdiction of the superior "courts. The 7th section of the act of 1823 vests the "whole judicial power of the Territory 'in two superior "'courts and in such inferior courts and justices of the peace "'as the legislative council of the Territory may from time "'to time establish.' This general grant is common to the "superior and inferior courts, and their jurisdiction is con- "current, except so far as it may be made exclusive in "either by other provisions of the statute. The jurisdic- "tion of the superior courts is declared to be exclusive "over capital offences; on every other question over which "those courts may take cognizance by virtue of this sec- "tion, concurrent jurisdiction may be given to the inferior "courts." * * * * * *

"It has been contended that by the Constitution the "judicial power of the United States extends to all cases "of admiralty and maritime jurisdiction, and that the "whole of this judicial power must be vested 'in one su- "'preme court and in such inferior courts as Congress "'shall from time to time ordain and establish.' Hence, it "has been argued that Congress cannot vest admiralty

" jurisdiction in courts created by the territorial legisla-
" ture. We have only to pursue this subject one step
" further to perceive that this provision of the Constitu-
" tion does not apply to it. The next sentence declares,
" that 'the judges, both of the supreme and inferior
" 'courts, shall hold their offices during good behavior.'
" The judges of the Superior Court of Florida hold their
" offices for four years.* These courts, then, are not con-
" stitutional courts, in which the judicial power conferred
" by the Constitution on the general government can be
" deposited. They are incapable of receiving it. They
" are legislative courts, created in virtue of the general
" right of sovereignty which exists in the government, or
" in virtue of the clause which enables Congress to make
" all needful rules and regulations respecting the territory of
" the United States. The jurisdiction with which they
" are invested is not a part of that judicial power which
" is defined in the 3d article of the Constitution, but
" is conferred by Congress in the execution of those
" general powers which that body possesses over the Ter-
" ritories of the United States. Although admiralty juris-
" diction can be exercised in the States in those courts
" only which are established in pursuance of the 3d article
" of the Constitution, the same limitation does not extend
" to the Territories. In legislating for them, Congress ex-
" ercises the combined powers of the general and of a
" State government.

" We think, then, that the act of the territorial legisla-
" ture erecting the court by whose decree the cargo of the
" Point a Petre was sold is not 'inconsistent with the laws
" 'and Constitution of the United States' and is valid.
" Consequently, the sale made in pursuance of it changed
" the property, and the decree of the Circuit Court
" awarding restitution of the property to the claimant
" ought to be affirmed with costs."

We have quoted this case quite fully because it meets and answers the objections made against the validity of the act of the territorial legislature of Arizona.

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*NOTE.—Same provision in Rev. Stat., sec. 1864.